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No. 011853

In The
Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF
MARSHALL G. GARDINER, DECEASED

J'NOEL GARDINER, PH.D.,

Petitioner,

v.

JOSEPH M. GARDINER, III,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner J'Noel Gardiner, Ph.D., is a post-operative male-to-female transsexual. Dr. Gardiner was born in Wisconsin. Like the laws in 20 other States, a Wisconsin statute explicitly authorizes amendment of the sex designation on the birth certificates of persons who have undergone "a surgical sex-change procedure." Pursuant to this statute, a Wisconsin court ordered that Dr. Gardiner be issued a new, original birth certificate reporting her sex at birth as female. Dr. Gardiner later married Marshall Gardiner in Kansas. Mr. Gardiner died intestate in August 1999. Despite the Wisconsin court order and birth certificate, the Kansas Supreme Court held that Dr. Gardiner is male, that her marriage to Mr. Gardiner was invalid, and that she was therefore not entitled to a spousal share of Mr. Gardiner's estate.

The question presented is:

Whether the Full Faith and Credit Clause, U.S. CONST., Art. IV, cl. 1 – which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State" – requires a State to recognize an individual's sex as reported in a birth certificate issued pursuant to court order by the State in which the individual was born.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner J'Noel Gardiner, Ph.D., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Kansas in this case.

OPINIONS BELOW

The opinion of the Kansas Supreme Court (App. 1a-40a) is reported at 42 P.3d 120. The opinion of the Kansas Court of Appeals (App. 41a-95a) is reported at 29 Kan. App.2d 922 and 22 P.3d 1086. The bench ruling and Journal Entry of Judgment of the District Court of Leavenworth County, Kansas (App. 96a-105a) are unreported.

JURISDICTION

The Kansas Supreme Court issued its opinion and judgment on March 15, 2002. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, clause 1 of the Constitution of the United States provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner

> in which such Acts, Record and Proceedings shall be proved, and the Effect thereof.

Section 69.15(4)(b) of the Wisconsin Statutes provides:

> Any person with a direct and tangible interest in a birth certificate registered in this state may petition a court to change the name and sex of the registrant on the certificate due to a surgical sex-change procedure. * * * [I]f the court orders the state registrar to prepare a new certificate the state registrar shall prepare a new certificate under sub. (6).

Section 23-101 of the Kansas Statutes provides in relevant part:

> The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. * * *

STATEMENT

A. Underlying Facts

Petitioner J'Noel Gardiner holds a Ph.D. in Finance, and is an Associate Professor of Finance at Park University in Parkville, Missouri. App. 3a. Dr. Gardiner was born in Green Bay, Wisconsin in 1957. Dr. Gardiner was born a male, with the name Jay Noel Ball. *Id.* at 2a.

Dr. Gardiner was diagnosed with gender dysphoria or transsexualism. She testified below that from a very early age she perceived herself as a female, but with male anatomy. App. 3a.

Between 1991 and 1995, and in conjunction with psychiatric and psychological counseling she was then receiving, Dr. Gardiner began hormone replacement therapy, and underwent a series of surgeries in Wisconsin to effect a sex change. App. 4a.

Since 1985, Wisconsin law has authorized any interested person to petition a court to change the sex on a Wisconsin birth certificate "due to a surgical sex-change procedure." Wis. Stat. § 69.15(4)(b). Pursuant to this statute, Dr. Gardiner petitioned the Circuit Court of Outagamie County, Wisconsin to order the issuance of a new birth certificate reflecting her new name of J'Noel Ball, and her sex as female. App. 4a.

On August 8, 1994, the Circuit Court issued its "Report of Order to Change Name & Sex on Birth Certificate Due to Surgical Sex-Change Procedure," directing the State Registrar to issue Dr. Gardiner a new birth certificate. App. 4a-5a. The Court's Order states:

> The facts of birth have changed due to a surgical sex change procedure performed on 8/1/94. The State Registrar is hereby ordered to change this birth certificate as directed below:
>
> > Sexual designation shall be changed from Male to Female.
> >
> > The name to be entered on the birth certificate is J'Noel Ball.
>
> The State Registrar shall prepare a new birth record for the registrant and impound the original record.

1 Record on Appeal 233.

Pursuant to the Court's order, the Wisconsin Department of Health and Social Services issued Dr. Gardiner a new "Original Certificate of Live Birth." App. 106a. This certificate bears a "State Filing Date" of December 10, 1957. It reports "CHILD-NAME" to be "J'Noel Ball," and sex to be female. *Id.* Consistent with the Court's order, this birth certificate bears no indication that it has been altered since 1957. *Id.*[1]

Dr. Gardiner met Marshall Gardiner in May 1998. App. 3a. Approximately two months after they met, and before they were married, Dr. Gardiner informed Marshall Gardiner that she had undergone sex change surgery. App. 3a ("There is no evidence in the record to support [Respondent] Joe [Gardiner]'s suggestion that Marshall did not know about J'Noel's sex reassignment.").

Dr. Gardiner and Marshall Gardiner were married in Kansas on September 25, 1998. App. 3a. Justice Robert E. Davis of the Kansas Supreme Court officiated at the wedding. (Justice Davis did not participate in the decision below. App. 40a.)

Marshall Gardiner died intestate on August 12, 1999. App. 5a.

Respondent Joseph M. Gardiner, III is Marshall Gardiner's son from a prior marriage, which ended in 1984 on the death of Marshall Gardiner's first wife. App. 2a. (To avoid confusion, Joseph M. Gardiner, III is referred to as

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[1] The certified copy of Dr. Gardiner's birth certificate introduced below (reproduced at App. 106a) was prepared on September 26, 1994; but this is the date of copying, *not* the date of issuance of the underlying record.

"Respondent" throughout this Petition.) Respondent and Marshall Gardiner had been estranged since 1983. *Id.*

B. Proceedings Below

Under Kansas law, where a person dies intestate with a surviving spouse and surviving children, the spouse is entitled to a fifty percent spousal share of the decedent's estate. K.S.A. § 59-504.

Despite their estrangement, following Marshall Gardiner's death Respondent filed a petition for letters of administration with the Probate Division of the District Court of Leavenworth County, Kansas, claiming that he was Marshall Gardiner's sole heir. Dr. Gardiner filed an objection, and asked that letters of administration be issued to her instead.

1. Respondent moved for summary judgment, arguing that Dr. Gardiner had no right to a share of Marshall Gardiner's estate, on the grounds: (1) that Dr. Gardiner had waived her right to a spousal share; (2) that she had induced Marshall Gardiner to marry her through fraud; and (3) that Dr. Gardiner remained a male, and therefore could not satisfy the requirement of K.S.A. § 23-101 that only persons of the "opposite sex" could validly marry.

In opposing Respondent's claim that her marriage was invalid, Dr. Gardiner relied on the fact that a Wisconsin court, acting pursuant to an explicit Wisconsin statute, had ordered that her birth certificate be reissued to reflect her sex at birth as female, and that the Wisconsin Department of Health and Social Services had in fact issued her a new, original birth certificate in compliance with the

Court's order. Suggestions in Opposition to Joseph M. Gardiner, III's Motion for Summary Judgment at 21-28, 29 (Jan. 3, 2000). Relying on the federal Full Faith and Credit Clause, Dr. Gardiner argued:

> Mrs. Gardiner is legally female, according to a Wisconsin court and the State Registrar. * * * [¶] State records prepared by an authorized agency of the State, at the direction of a judge in that state, are entitled to full faith and credit by all other states. Thus, Kansas is bound to recognize J'Noel Gardiner's sexual identity as a female.

Id. at 29.

While the District Court held that summary judgment was unjustified on Respondent's claims of fraud and waiver, App. 101a-102a, the court granted Respondent summary judgment on the ground that, despite her Wisconsin birth certificate, Dr. Gardiner "was born a male and remains a male for purposes of marriage under Kansas law." *Id.* at 96a-97a. The trial court rejected Dr. Gardiner's argument that her Wisconsin birth certificate was entitled to full faith and credit with the following explanation:

> [I]f I gave full faith and credit, all I would do is give full faith and credit to the fact that they authorized – the Court authorized a change in her birth certificate.
>
> It is not that a Court, after a hearing, found her to be a woman. Or a female, I should say, or – so therefore, the Court, if it gave full faith and credit, it would have no impact on the findings of the Court today.

> Furthermore, it is just an administrative ruling made to correct a document or to change a document, and therefore, the Court questions whether full faith and credit needs to be given to those type of administerial acts.

App. 104a-105a.

2. Dr. Gardiner appealed the District Court's ruling to the Kansas Court of Appeals, which reversed on May 11, 2001.

The Court of Appeals noted that, although Kansas' marriage laws prohibit same-sex marriages, those laws are silent concerning marriages by post-operative transsexuals. App. 49a-50a. The Court of Appeals then engaged in an extended discussion of the scientific literature concerning transsexualism. The court noted that a recent medical study had suggested a neurobiological basis for the condition. The court also quoted at length from a law review article which reviewed various genetic, hormonal, and other conditions which result in ambiguous or contradictory sexual characteristics or identity. *Id.* at 52a-68a. Although a common understanding of sex relies solely on chromosomes, the court observed that numerous documented medical conditions "do[ ] not conform with such a rigid framework of thought." *Id.* at 52a.

After a further, lengthy discussion of prior cases addressing the rights of transsexuals in a variety of contexts, App. 68a-83a, the Court of Appeals concluded that Dr. Gardiner's sex could not be determined based solely on "what the individual's chromosomes were or were not at the moment of birth." *Id.* at 93a. The court accordingly reversed the District Court's grant of summary judgment to Respondent, and held that a number of

factors beyond chromosomal makeup must be considered in determining Dr. Gardiner's sex on remand, "including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity." *Id.* at 93a-94a.[2]

In so ruling, the Court of Appeals rejected Dr. Gardiner's contention that the Wisconsin court order requiring that she be issued a new, original birth certificate reporting her sex at birth as female, and the amended birth certificate itself, were entitled to full faith and credit. As an initial matter, however, the Court of Appeals rejected Respondent's argument that the Wisconsin court order was not a judgment, since it was signed by a judge. App. 87a. "Even if it were not," the court next observed, "the Full Faith and Credit Clause of the Constitution still requires full faith and credit to be given to records of other states," "[a]bsent an overriding consideration," such as "Kansas public policy." *Id.* Because Kansas had not taken a position on the amendment of birth certificates following sex change surgery, the court interpreted Kansas public policy "as neutral, favoring neither J'Noel's nor Joe's positions." *Id.* at 89a.

Nevertheless, the Court of Appeals rejected Dr. Gardiner's full faith and credit arguments. First, the Court noted that full faith and credit arguably should be denied because Respondent was not a party to the Wisconsin proceeding. App. 89a. The court held, however, that it need

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[2] The Court of Appeals affirmed the District Court's conclusion that summary judgment was unwarranted on Respondent's fraudulent inducement claim, and found that Respondent had failed to appeal the District Court's denial of summary judgment based on waiver. App. 92a-93a.

not decide this issue, since "[e]ven if it is assumed that J'Noel's amended birth certificate must be given full faith and credit in Kansas," the court was only required to give the birth certificate as much weight as it would have in Wisconsin. *Id.* at 90a. The court then quoted a Wisconsin statute "deal[ing] with the evidentiary weight placed on vital statistic records":

> [T]he evidentiary value of a vital record filed more than one year after the event which is the subject of the vital record occurred or of a vital record which has been amended shall be determined by the judicial or administrative agency or official before whom the vital record is offered as evidence.

App. 90a (*quoting* Wis. Stat. § 69.21(1)(c)).

Although Respondent had never questioned the authenticity or admissibility of Dr. Gardiner's reissued birth certificate, the Court of Appeals held that in denying that birth certificate any *substantive* effect, the District Court had merely "determine[d] the weight of the evidence offered": "The court in Kansas appeared to give the birth certificate little or no weight, which was its option. This was not error." App. 90a-91a.

Respondent petitioned the Kansas Supreme Court to review the Court of Appeals' decision, arguing that the Court of Appeals had adopted an erroneous standard for determining a person's sex for purposes of Kansas' marriage statutes. In her Response, Dr. Gardiner argued that the Court of Appeals' vacatur of the summary judgment was justified because her "Wisconsin birth certificate designating her as female should be given Full Faith and Credit and full evidentiary weight by the Kansas Court."

Appellant J'Noel Gardiner's Response to Petition for Review at 11-13 (June 18, 2001).

3. On March 15, 2002, the Kansas Supreme Court reversed the decision of the Court of Appeals. After stating the factual and procedural background of the case, the Kansas Supreme Court framed the issue as a choice between two competing lines of authority:

> On the question of validity of the marriage of a post-operative transsexual, there are two distinct "lines" of cases. One judges validity of the marriage according to the sexual classification assigned to the transsexual at birth. The other views medical and surgical procedures as a means of unifying a divided sexual identity and determines the transsexual's classification for the purpose of marriage at the time of marriage.

App. 7a. Like the Leavenworth County District Court, the Kansas Supreme Court quoted extensively from the decision in *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Civ. App. 1999), *cert. denied*, 531 U.S. 872 (2000), which stated the question presented by these cases as follows:

> [C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?

9 S.W.3d at 224, *quoted in decision below*, App. 8a, 30a.

Likewise, the court characterized Respondent's argument as also focusing on sex at birth:

> The plain and unambiguous meaning of K.S.A. 2001 Supp. 23-101, according to Joe, is that a valid marriage must be between two persons who are of opposite sex at the time of birth. * * * [¶]

> Joe also contends that the legislature did not intend for the phrase "opposite sex" in K.S.A. 2001 Supp. 23-101 to allow for a change from the sexual classification assigned at birth.

App. 12a-13a.

While the Kansas Supreme Court's decision consists largely of lengthy quotations from, or summaries of, other decisions, its actual reasoning appears in a single paragraph at the end of its opinion. After explaining that in construing statutes "[w]ords in common usage are to be given their natural and ordinary meaning," App. 36a, the court stated:

> The words "sex," "male," and "female" in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but, the ability to "produce ova and bear offspring" does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the *Littleton* court noted, the transsexual still "inhabits . . . a male body in all aspects other than what the physicians have supplied." 9 S.W.3d at 231. J'Noel does not fit the common meaning of female.

App. 36a-37a.

Because it held that Dr. Gardiner was male as a matter of law, the Kansas Supreme Court affirmed the District Court's ruling that Dr. Gardiner's marriage to

Marshall Gardiner was invalid under Kansas law, and that she was therefore not entitled to any share of Marshall Gardiner's estate. App. 40a.[3]

REASONS FOR GRANTING THE WRIT

If accorded constitutionally mandated full faith and credit, Dr. Gardiner's amended Wisconsin birth certificate, and the court order requiring its issuance, are decisive of the core question addressed by the Kansas courts – is Dr. Gardiner female, and therefore of the "opposite sex" from her deceased husband?

The Question Presented is important, and unresolved. Although the Full Faith and Credit Clause speaks of a State's "public Acts, Records, and judicial Proceedings," this Court has not previously addressed a State's constitutional obligation to recognize another State's non-judicial records. Indeed, this Court's recent opinions can be read to

[3] The Kansas Supreme Court did not expressly address the full faith and credit issue. However, by holding that Dr. Gardiner is male for purposes of Kansas' marriage laws, the court necessarily rejected her contention that this issue was conclusively determined by her Wisconsin birth certificate, and the court order requiring its issuance.

Dr. Gardiner adequately raised the federal constitutional issue before the Kansas Supreme Court. As quoted, *supra*, her Response to Petition for Review clearly addresses the issue, as permitted by KAN. S. CT. R. 8.03(c)(3). Moreover, once review was granted the Kansas Supreme Court decided the case on the briefs filed in the Court of Appeals. KAN. S. CT. R. 8.03(g)(2). Dr. Gardiner's opening Court of Appeals brief invoked the Full Faith and Credit Clause, and cited decisions holding that the federal full faith and credit requirement applies to birth certificates. *See* Brief of Appellant J'Noel Gardiner at 39, 43-44 (citing *Casares-Moreno v. United States*, 226 F.2d 873 (9th Cir. 1955) and *Northern v. State*, 216 S.W.2d 192 (Tex. Crim. App. 1944)).

suggest that there are just two categories of State action to which the full faith and credit obligation applies – statutory and decisional law, on the one hand, and judgments in adversarial proceedings, on the other. Given the lack of guidance from this Court, lower courts have taken conflicting positions concerning the degree to which non-judicial records are entitled to full faith and credit, and, in particular, whether the forum State's public policy can justify a refusal to recognize matters determined by an issuing State's records.

This case presents a valuable opportunity to clarify that there is a third branch of State government beyond a Legislature and a Judiciary – namely, an Executive branch – whose official actions create rights and obligations to which full faith and credit must be applied. (The fact that the executive action here was taken pursuant to a court order mandating it (a court order which is arguably a "judgment" in its own right), only heightens the strength of Petitioner's argument that full faith and credit must be accorded.) Given the ubiquity of State administrative actions in non-adversarial contexts (*e.g.*, issuance of charters, permits, and licenses), and in particular the importance of vital records like birth certificates in defining an individual's legal status and rights, clarification of the effect of such actions beyond the issuing State is warranted, and long overdue.

The importance of the Question Presented is highlighted by the fact that 20 other States have enacted statutes, like Wisconsin's, explicitly authorizing amendment or re-issuance of birth certificates in the event of sex change surgery. The evident purpose of these statutes is to bring much-needed certainty to the legal status of transsexuals, and to recognize that persons suffering gender

dysphoria are, and were, of their post-operative sex from the moment of birth. Yet if the Kansas decision stands, the legislatively declared policy of these 21 States is set for naught. And the persons for whose benefit these many statutes were enacted are left in an untenable position – *no* official determination of their sex will be universally recognized, disabling their activities in all phases of their lives, including their exercise of the fundamental right to marry, in schools or the workplace, or with respect to receipt of governmental benefits.

I. This Case Presents an Important, and Fundamental, Question Concerning the Scope of the Full Faith and Credit Clause, which this Court Has not Directly Answered, and with Respect to Which the Lower Courts Are in Disarray.

1. Unlike Article IV of the Articles of Confederation, which mandated full faith and credit solely for court records, the Full Faith and Credit Clause of the United States Constitution unambiguously provides that "Full Faith and Credit shall be given in each State to the public Acts, *Records*, and judicial Proceedings of every other State." U.S. CONST., Art. IV, cl.1 (emphasis added). And in a statute enacted in 1804, Congress explicitly provided for the interstate recognition of non-judicial records:

> [F]rom and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, * * * shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of

> the ~~state~~ from when the same are, or shall be taken.

Act of March 27, 1804, ch. 56, 2 Stat. 298, 298-99. The substance of the 1804 enactment appears in present-day 28 U.S.C. § 1739, which specifies that "[a]ll nonjudicial records or books kept in any public office of any State" are entitled to full faith and credit.

As this Court recognized in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813), which construed the identical language of the predecessor of 28 U.S.C. § 1738 (full faith and credit for state-court judgments), the "full faith and credit" language of the 1804 Act mandates more than mere "admission of such records *as evidence*"; instead, by this enactment "Congress have [] declared the *effect* of the record by declaring what faith and credit shall be given to it." *Id.* at 484 (emphasis in original).

Yet, despite its impressive lineage, this Court has never addressed the scope of a State's obligation to provide full faith and credit to another State's non-judicial "Records," reflecting the official actions of the rendering State's Executive. To the contrary, as recently as *Baker v. General Motors Corp.*, 522 U.S. 222 (1998), this Court explained the scope of the full faith and credit obligation without reference to Executive-branch actions.

> Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. "In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded." The Full Faith and

> Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Regarding judgments, however, the full faith and credit obligation is exacting. * * *
>
> A court may be guided by the forum State's "public policy" in determining the *law* applicable to a controversy. But our decisions support no roving "public policy exception" to the full faith and credit due *judgments*.

Id. at 232-33 (citations omitted; emphasis in original).

The dichotomy recognized in *Baker* – between statutory and decisional "law", on the one hand, and "judgments" in adversarial proceedings, on the other – is incomplete. It fails to account for the fact that there are *three* branches of a State's government which may take actions affecting a person's rights and responsibilities: a Judiciary, a Legislature, *and an Executive*. And while the official actions of the Executive branch may not be "laws" (because they operate with respect to specific persons, not prospectively as to all persons similarly situated) or "judgments" (because they do not arise out of adversarial proceedings), they nevertheless create rights and obligations which are entitled to full faith and credit outside the rendering State.[4]

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[4] While this Court has recognized a full faith and credit obligation with respect to administrative worker's compensation awards, it has done so in reliance on the quasi-judicial nature of worker's compensation proceedings, not on the awards' status as "Records" of official State action. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943).

As this Court is no doubt aware, more so today than in 1787, many legal rights and obligations are created neither by State Legislatures, nor by their Judiciaries, but are instead created by actions of the Executive branch – charters, permits, licenses, grants, findings, orders, determinations, and other like actions are taken by administrative agencies every day. In many instances, such actions are not later reduced to, or incorporated within, a court judgment in the rendering State, nor are such actions necessarily the "functional equivalent" of an adversarial judgment. Yet the rights and obligations created by these official actions are nevertheless real and important, and are entitled to recognition throughout the Nation. But this Court has never spoken to the question of the scope of the States' constitutional obligation to recognize official actions reflected in another State's non-judicial records.

The status of birth records, in particular, demands certainty. Vital records are "vital" because of what they decide: in the case of a birth certificate, an individual's age, sex, parents, legitimacy, and state and country of citizenship. Countless legal rights and obligations flow from these essential facts. It is of fundamental importance to all Americans that the facts reported in such vital records are conclusively established, and universally recognized.

2. Contrary to the decision below, numerous lower court decisions recognize that birth certificates are "Records" or "public Acts" entitled to full faith and credit

beyond the issuing State.[5] Similarly, with limited exceptions,[6] lower court decisions generally recognize that other State administrative actions are likewise entitled to full faith and credit.[7]

The lower-court decisions part company on a critical issue, however. Lacking more definitive guidance from this Court, decisions in many instances hold that the full faith and credit due non-judicial State actions is to be determined under the relatively relaxed standards governing the application of a foreign State's substantive law; most notably, this analysis permits the forum to determine whether the issuing State's action is repugnant to the

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[5] *See, e.g., Casares-Moreno v. United States*, 226 F.2d 873 (9th Cir. 1955); *Kappler v. Shalala*, 840 F. Supp. 582, 587 n.10 (N.D. Ill. 1994); *Bennett v. Schweiker*, 532 F. Supp. 837, 839-40 (D.D.C. 1982); *Tindle v. Celebrezze*, 210 F. Supp. 912, 914-15 (S.D. Cal. 1962); *Northern v. State*, 216 S.W.2d 192, 195 (Tex. Crim. App. 1949).

[6] *See, e.g., Will of Dow*, 55 A.D.2d 323, 390 N.Y.S.2d 721, 731 (1977) ("It is a recognized general rule that tax assessments issued by the administrative authorities of other states which are not reduced to judgments will not be accorded either full faith and credit or comity."); App. 105a (denying full faith and credit to Dr. Gardiner's birth certificate on the ground that "it is just an administrative ruling"); *see also Thrall v. Wolfe*, 503 F.2d 313, 315-16 (7th Cir. 1974) ("it is open to question" whether non-judicial actions of one State entitled to preclusive effect in forum, "even if the issuing state gives them that effect"), *cert. denied*, 420 U.S. 972 (1975).

[7] *See, e.g., Colby v. Long*, 289 F.2d 137, 141 (6th Cir. 1961) (vehicle title); *Young v. JCR Petroleum, Inc.*, 423 S.E.2d 889, 892 (W. Va. 1992) (corporate dissolution); *500 Motors, Inc. v. Superior Ct.*, 122 Cal. App.3d 827, 176 Cal. Rptr. 349, 352 (1981) (vehicle title); *People v. Terry*, 61 Cal.2d 137, 390 P.2d 381, 388 (1964) (executive pardon), *cert. denied*, 379 U.S. 866 (1964); *Wells v. Hiskett*, 288 S.W.2d 257, 263 (Tex. Civ. App. 1956, writ ref'd n.r.e.) (corporate charter); *see also* cases cited in note 8, *infra*.

forum's public policy.[8] Determinations made in a State's official records are thereby held hostage to a forum court's application of an interest-balancing choice of law analysis.

Academic commentary has frequently taken a similar approach: if an action is not a "judgment", it must present an issue concerning choice of law – is the forum State constitutionally compelled to itself apply a foreign State's substantive law?[9]

This latter analysis is deeply flawed. A forum may apply its own substantive law, consistent with the Full Faith and Credit Clause, if it has "'a significant contact or

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[8] *See, e.g.*, *Yacovone v. Bolger*, 645 F.2d 1028, 1035 (D.C. Cir. 1981) (applying "competing public policies" analysis to determine whether to recognize foreign State's pardon), *cert. denied*, 454 U.S. 844 (1981); *Thrall v. Wolfe*, 503 F.2d 313, 316 (7th Cir. 1974) (decision whether to give effect to foreign State's pardon "depend[s] on an analysis of the policies underlying conflicting laws"), *cert. denied*, 420 U.S. 972 (1975); *In re Estate of Toutant*, 247 Wis.2d 400, 633 N.W.2d 692, 699-700 (App. 2001) (marriage); *Hoffman v. State*, 922 S.W.2d 663, 666-67 (Tex. App. 1996) (executive pardon); *People v. Norton*, 80 Cal. App.3d 14, 146 Cal. Rptr. 343, 346 (1978) (pardon); *Atlantic Fin. Co. v. Fisher*, 173 Ohio St. 387, 183 N.E.2d 135, 137 (1962) (vehicle ownership records); *State of Ohio v. Kleitch Bros., Inc.*, 357 Mich. 504, 98 N.W.2d 636, 643 (1959) (unappealed tax assessment).

[9] *See, e.g.*, Shana Brown, *Sex Changes and "Opposite-Sex" Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons' Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113, 1150-51 (2001) (recognition of reissued birth certificate); Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 179 (1998) ("the question of the recognition of a sister state's marriage license is a choice-of-law question[, since] no judgment is involved"); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1976 (1997) (assuming that a State's constitutional obligation to recognize a foreign-State marriage presents a choice-of-law issue).

significant aggregation of contacts'" with the controversy. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion). This Court applied these "modest restrictions" to choice-of-law determinations, *Shutts*, 472 U.S. at 818, because while the purpose of the Full Faith and Credit Clause "was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states," within broad limits the forum could not be forced to itself implement the law of another State. *Pacific Employers Ins. Co. v. Industrial Accid. Comm'n*, 306 U.S. 493, 501 (1939); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436-37 (1943).

But that rationale has no relevance here. No one is asking the State of Kansas to apply Wisconsin's law permitting the amendment of birth certificates following a surgical sex-change procedure, for one simple reason: *Wisconsin already has*. Rather, Kansas is being asked to recognize "rights acquired" by Dr. Gardiner under "the public acts and judicial proceedings" of Wisconsin, not to apply Wisconsin law in the first instance. The relaxed constitutional standards applicable to one State's application of another State's statutory or decisional law are irrelevant here.

3. The constitutional stature of Dr. Gardiner's reissued birth certificate is heightened by the fact that the certificate was issued pursuant to a court order finding that Dr. Gardiner satisfied the standards of Wis. Stat. § 69.15(4)(b) – the practice prevailing in most States with similar statutes. The Kansas Court of Appeals' suggestion that the court order requiring issuance of Dr. Gardiner's Wisconsin birth certificate could not bind Respondent,

because he was not a party to the Wisconsin proceeding, App. 89a, is foreclosed by *Williams v. North Carolina*, 317 U.S. 287 (1942). *Williams* expressly held that a divorce decree was entitled to full faith and credit, even as against persons who were not parties to the earlier proceeding, because a divorce proceeding "is not a mere *in personam* action. * * * [It] involve[s] the marital status of the parties." *Id.* at 297-98. The determination of Dr. Gardiner's sexual status is likewise more than a simple *in personam* judgment, and must be universally recognized to be effective.

4. The impact of a decision in this case on Dr. Gardiner, and others similarly situated, separately demonstrates the importance of the Question Presented. Notably, fully 20 States besides Wisconsin explicitly authorize the amendment of birth certificates, most by court order, in the event a person born within the State undergoes a surgical sex change procedure.[10] The statutes in nine of

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[10] ALA. CODE § 22-9A-19(d); ARIZ. REV. STAT. § 36-326(A)(4); ARK. CODE § 20-18-307(d); CAL. HEALTH & SAFETY CODE § 103425; COLO. REV. STAT. § 25-2-115(4); GA. CODE § 31-10-23(e); HAW. REV. STAT. § 338-17.7(4)(B); 410 ILL. COMP. STAT. § 535/17(1)(d); IOWA CODE § 144.22(3); LA. REV. STAT. § 40:62; MD. CODE HEALTH-GEN. § 4-214(a)(5); MASS. GEN. LAWS ch. 46, § 13(e); MO. REV. STAT. § 193.215.9; NEB. REV. STAT. § 71-604.01; N.J. REV. STAT. § 26:8-40.12; N.M. STAT. § 24-14-25(D); N.C. GEN. STAT. § 130A-118(b)(4); OR. REV. STAT. § 432.235(4); UTAH CODE § 26-2-11; VA. CODE § 32.1-269(E); *see also* D.C. CODE § 7-217(d); GUAM CIV. CODE § 3222(e). By judicial decision, Puerto Rico has recognized the same right. *Ex Parte Andino Torres*, ___ D.P.R. ___, 2000 WL 1007105 (P.R. June 30, 2000). Only Tennessee explicitly bars an amendment in these circumstances. *See* TENN. CODE § 68-3-203(d).

The States authorizing such amendments are apparently following the "Model State Vital Statistics Act" promulgated in 1977 by the federal Public Health Service. Section 21(e) of the Model Act provides that pursuant to a court order "indicating the sex of an individual born

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those States, like Wisconsin's, expressly provide that in the event of such an amendment, the birth certificate originally issued, as well as all evidence of the amendment, shall be sealed.[11]

Gender dysphoria, or transsexualism, is a recognized medical condition, affecting children, adolescents, and adults of both sexes. American Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed. 1994) ("DSM-IV"). Recent research suggests a neurobiological basis for the condition. *See, e.g.*, Jiang-Ning Zhou, et al., *A Sex Difference in the Human Brain and its Relation to Transsexuality*, 378 NATURE 68 (1995). As this Court has itself recognized, transsexuals "typically seek[ ] medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change," as Dr. Gardiner has done. *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

Statistics concerning the number of transsexuals are not readily available. However, one study estimates that transsexualism affects one in 10,000 males, and one in 30,000 females. *See* Shana Brown, *supra,* note 9, at 1125 & n. 64. The American Psychiatric Association has reported that, while "no recent epidemiological studies [ ] provide data on prevalence," statistics from Europe suggest "that

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in this State has been changed by surgical procedure * * *, the certificate of birth of such individual shall be amended as prescribed by regulation."

[11] ARIZ. REV. STAT. § 36-326(B); CAL. HEALTH & SAFETY CODE §§ 103430(d), 103440; HAW. REV. STAT. § 338-17.7(4)(B); 410 ILL. COMP. STAT. § 535/17(2)(a); IOWA CODE § 144.24; LA. REV. STAT. § 40:62(D); NEB. REV. STAT. § 71-604.01; N.J. REV. STAT. § 26:8-40.12(d); N.C. GEN. STAT. § 130A-118(e).

roughly 1 per 30,000 adult males and 1 per 100,000 adult females seek sex-reassignment surgery." DSM-IV, *supra*, at 535.

The uncertain characterization of post-operative transsexuals' sex raises numerous legal questions, and has spawned litigation concerning transsexuals' right to marry,[12] to change names,[13] to be free of workplace discrimination,[14] or to appropriate treatment in prisons.[15] Nearly half the States, including Wisconsin, have sought to resolve this uncertainty by providing an orderly statutory process to definitively determine a post-operative transsexual's sex. The refusal of the courts below to recognize the import of a reissued birth certificate leaves persons like Dr. Gardiner in the legal limbo from which Wisconsin and 20 other States have sought to rescue them. The importance of clarifying the legal effect of a reissued

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[12] *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Civ. App. 1999), *cert. denied*, 531 U.S. 872 (2000); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. 1987); *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204 (App. Div. 1976); *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (S.Ct. 1971).

[13] *See, e.g., In re McIntyre*, 552 Pa. 324, 715 A.2d 400 (1998); *In re Eck*, 245 N.J. Super. 220, 584 A.2d 859 (App. Div. 1991).

[14] *See, e.g., Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478 (D. Kan. 1995); *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96 (D.D.C. 1994); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001); *Enriquez v. West Jersey Health Sys.*, 342 N.J. Super. 501, 777 A.2d 365 (App. Div. 2001); *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983).

[15] *Farmer v. Brennan*, 511 U.S. 825 (1994); *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999); *Wolfe v. Horne*, 130 F. Supp.2d 648 (E.D. Pa. 2001). *See also Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (right to asylum based on persecution in home country).

birth certificate is heightened by the fact that this determination may control the right to marry, "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see also, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

Under the Kansas Supreme Court's decision, Dr. Gardiner is now apparently a woman in Wisconsin (and, presumably, in at least the 20 other States that similarly permit amendments to birth certificates), but a man in Kansas. In *Williams v. North Carolina*, 317 U.S. 287 (1942), this Court recognized the absurdity of permitting different States to declare an individual's status in different, mutually contradictory ways, and accordingly held that North Carolina was constitutionally compelled to give full faith and credit to an *ex parte* Nevada divorce:

> [I]f one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina, * * * a man would have two wives, a wife two husbands. * * * Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other. * * * These intensely practical considerations emphasize for us the essential function of the full faith and credit clause in substituting a command for the former principles of comity and in altering the "status of the several states as independent foreign sovereignties" by making them "integral parts of a single nation."

Id. at 299-302 (citations omitted); *see also*, Robert H. Jackson, *Full Faith and Credit – the Lawyer's Clause of the Constitution*, 45 COLUM. L.REV. 1, 29 (1945) (while Full

Faith and Credit Clause does not establish criteria for determining domicile, clause does insure that individuals "have some place in our federal system where they really belong for purposes of fixing their legal status and determining by whom they shall be governed.").

5. The importance of clarifying whether, and to what extent, one State owes full faith and credit to another's non-judicial "Records" is highlighted by the controversy surrounding a distinct, but related, issue – a State's obligation to recognize a marriage performed in another State. In enacting the Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2416 (1996), codified at 28 U.S.C. § 1738C, which empowered States to refuse recognition to same-sex marriages performed in other States, Congress recognized that the degree to which non-judicial records were entitled to full faith and credit beyond the rendering State was an open, and important, constitutional issue. Responding to the argument that a marriage license issued in one State should be entitled to full faith and credit in every other State, the relevant House report responds:

> That may or may not be the case. Because no State has ever recognized homosexual "marriage", we simply cannot know how courts will rule on the Full Faith and Credit Clause issue. As a result, *we are confronted now with significant legal uncertainty concerning this matter of great importance to the various States.* While the Committee does not believe that the Full Faith and Credit Clause, properly interpreted and applied, would require sister States to give legal effect to same sex "marriages" celebrated in other States, there is sufficient uncertainty that we believe congressional action is appropriate.

H.REP. NO. 104-464, 104th Cong., 2d Sess. 25 (1996), *reprinted in* 1996 U.S. CODE CONG. & ADMIN. NEWS 2905, 2929 (emphasis added; footnote omitted). The statement of minority views in House Report 104-464 similarly recognizes the uncertain legal status of nonjudicial records under the Full Faith and Credit Clause:

> The Supreme Court has not yet passed on the manner in which marriages per se [or, we might add, birth certificates] are entitled to full faith and credit, even though it would appear from the face of the clause they should be afforded full faith and credit as either Acts or Records.

Id. at 38, 1996 U.S. Code Cong. & Admin. News at 2941.[16]

II. Dr. Gardiner's Reissued Wisconsin Birth Certificate, and the Court Order Requiring its Issuance, Were Entitled to Full Faith and Credit in Kansas, and Mandated that the Kansas Courts Recognize the Validity of Dr. Gardiner's Marriage to the Decedent.

In essence, the Kansas Supreme Court's opinion rejected Dr. Gardiner's position that she was a female who could lawfully marry Marshall Gardiner on the basis that Dr. Gardiner's "'gender [was] immutably fixed by our

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[16] While the legislative history of the Defense of Marriage Act highlights the importance of clarifying the full faith and credit due nonjudicial records, that Act presents a distinct issue, since its constitutionality hinges on the second sentence of the Full Faith and Credit Clause, which gives Congress the power to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." No similar congressional enactment is implicated here.

Creator at birth.'" App. 8a, 30a, *quoting Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. Civ. App. 1999), *cert. denied*, 531 U.S. 872 (2000). The court's opinion makes clear that it was sex at birth, and the court's view that actions following birth cannot change that sex, that were decisive.

What the court below failed to recognize, however, was that *the State of Wisconsin had already answered the question of Dr. Gardiner's sex at birth* – pursuant to a statute explicitly permitting such an amendment, a Wisconsin court had ordered the Department of Health and Human Services to issue Dr. Gardiner a birth certificate certifying her sex, *at birth*, to be female.

Given that she was born there, the State of Wisconsin clearly had the authority to register Dr. Gardiner's birth among its vital records, and to determine Dr. Gardiner's sex at the time of her birth.[17] And, the State of Wisconsin has made the determination that, where a transsexual undergoes the extensive medical procedures necessary to effect a sex change, the State will recognize that person's post-operative sex *from the time of their birth*. This is reflected in the new, original birth certificate issued to Dr. Gardiner, App. 106a, which reports a "State Filing Date" of December 10, 1957, and Dr. Gardiner's sex, *at the time of her birth*, to be female.[18]

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[17] The fact that Dr. Gardiner's sex change surgery was performed in Wisconsin gives that State a further interest in determining her post-operative sex.

[18] The essence of gender dysphoria or transsexualism is that individuals perceive themselves to be of a particular sex at a very early age, but their physiology is not congruent with their sexual identity, until that physiology is surgically altered. (Dr. Gardiner herself

(Continued on following page)

Yet although Wisconsin has acted to recognize Dr. Gardiner's sex throughout her life as female, and to seal from the public any reference to her pre-operative sex, the Kansas courts have ignored Wisconsin's decision, and have instead independently determined that Dr. Gardiner was male at birth, and remains male today.

The Kansas Court of Appeals' reliance on Wis. Stat. § 69.21(1)(c), which authorizes its courts to determine "the evidentiary value of a vital record * * * which has been amended," cannot justify the decision below. First, no one has ever challenged the "evidentiary value" of Dr. Gardiner's Wisconsin birth certificate – all acknowledge that it is an authentic, accurate, certified copy of a Wisconsin public record. *See* App. 85a ("Both parties agree that J'Noel's original birth certificate has been amended to state that J'Noel is a female"). As this Court recognized as long ago as *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1814), the "evidentiary value" of a document is a distinct issue from its substantive effect; the Court of Appeals confused these quite different concepts.

Second, even if the Wisconsin statute's reference to a determination of "evidentiary value" permitted the courts to determine *the factual accuracy* of the amended record, that is not what the Kansas courts did either.[19] For Dr.

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testified to this experience. App. 3a.) For Wisconsin to declare that, in such instances, the individual was in reality *always* of their post-operative sex is hardly irrational, and was clearly a determination within the province of the State of Wisconsin to make.

[19] In a series of cases, federal District Courts have examined the accuracy of birth dates reported in State records, where State law provides that those records are merely "*prima facie* evidence" of the facts reported therein. *Kappler v. Shalala*, 840 F. Supp. 582, 587 n.10

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Gardiner's reissued birth certificate *is* factually accurate – it accurately reports her sex to be female, under the Wisconsin-law definition of sex at birth (*i.e.*, the physiological sex to which one has been born, or the sex to which one has later been assigned by a "surgical sex change procedure"). No one denies the accuracy of the record – *e.g.*, by arguing that Dr. Gardiner has never undergone "a surgical sex-change procedure." It is ludicrous to contend that, under the guise of determining "evidentiary value," a Wisconsin court has the authority to deny any practical effect to the legislature's policy determination that a post-operative transsexual will be deemed to be of his or her post-operative sex from birth.

(N.D. Ill. 1994); *Bennett v. Schweiker*, 532 F. Supp. 837, 839-40 (D.D.C. 1982); *Tindle v. Celebrezze*, 210 F. Supp. 912, 914-15 (S.D. Cal. 1962).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 12, 2002

42 P.3d 120

Supreme Court of Kansas.

In the Matter of the ESTATE OF Marshall G. GARDINER, Deceased.

No. 85,030.

March 15, 2002.

Sanford P. Krigel, of Krigel & Krigel, P.C., of Kansas City, Missouri, argued the cause, and *Karen S. Rosenberg*, of the same firm, was with him on the briefs for appellant, J'Noel Gardiner.

William M. Modrcin, of Morrison & Hecker, L.L.P., of Kansas City, Missouri, argued the cause, and *David G. Watkins*, of the same firm, and *John F. Thompson*, of Davis, Beall, McGuire & Thompson, of Leavenworth, were with him on the briefs for appellee, Joseph M. Gardiner, III.

Aronda Strutt Kerns, of Wichita, and Patrick T. Gillen, of Thomas More Center for Law & Justice, of Ann Arbor, Michigan, were on the brief for amicus curiae, Thomas More Center for Law & Justice.

Lisa Nathanson, of American Civil Liberties Union of Kansas and Western Missouri, of Kansas City; Doni Gewirtzman, *Ruth E. Harlow*, *Beatrice Dohrn*, and Evan Wolfson, of the Lambda Legal Defense and Education Fund, Inc., of New York, New York; and Pamela Sumners, of the American Civil Liberties Union of Illinois, of Chicago, Illinois, were on the brief for amici curiae Gender Public Advocacy Coalition and American Civil Liberties Union of Kansas and Western Missouri.

The opinion of the court was delivered by *ALLEGRUCCI, J.*

J'Noel Gardiner appealed from the district court's entry of summary judgment in favor of Joseph M. Gardiner, III, (Joe) in the probate proceeding of Marshall G. Gardiner. The district court had concluded that the marriage between Joe's father, Marshall, and J'Noel, a post-operative male-to-female transsexual, was void under Kansas law.

The Court of Appeals reversed and remanded for the district court's determination whether J'Noel was male or female at the time the marriage license was issued. See *In re Estate of Gardiner,* 29 Kan.App.2d 92, 22 P.3d 1086 (2001). The Court of Appeals directed the district court to consider a number of factors in addition to chromosomes. Joe's petition for review of the decision of the Court of Appeals was granted by this court.

The following facts regarding J'Noel's personal background are taken from the opinion of the Court of Appeals:

> "J'Noel was born in Green Bay, Wisconsin. J'Noel's original birth certificate indicates J'Noel was born a male. The record shows that after sex reassignment surgery, J'Noel's birth certificate was amended in Wisconsin, pursuant to Wisconsin statutes, to state that she was female. J'Noel argued that the order drafted by a Wisconsin court directing the Department of Health and Social Services in Wisconsin to prepare a new birth record must be given full faith and credit in Kansas.
>
> "Marshall was a businessman in northeast Kansas who had accumulated some wealth. He had one son, Joe, from whom he was estranged. Marshall's wife had died some time before he met J'Noel. There is no evidence that Marshall was

not competent. Indeed, both Marshall and J'Noel possessed intelligence and real world experience. J'Noel had a Ph.D in finance and was a teacher at Park College.

"J'Noel met Marshall while on the faculty at Park College in May 1998. Marshall was a donor to the school. After the third or fourth date, J'Noel testified that Marshall brought up marriage. J'Noel wanted to get to know Marshall better, so they went to Utah for a trip. When asked about when they became sexually intimate, J'Noel testified that on this trip, Marshall had an orgasm. J'Noel stated that sometime in July 1998, Marshall was told about J'Noel's prior history as a male. The two were married in Kansas on September 25, 1998.

"There is no evidence in the record to support Joe's suggestion that Marshall did not know about J'Noel's sex reassignment. It had been completed years before Marshall and J'Noel met. Nor is there any evidence that Marshall and J'Noel were not compatible.

"Both parties agree that J'Noel has gender dysphoria or is a transsexual. J'Noel agrees that she was born with male genitalia. In a deposition, J'Noel testified that she was born with a 'birth defect' – a penis and testicles. J'Noel stated that she thought something was 'wrong' even prepuberty and that she viewed herself as a girl but had a penis and testicles.

"J'Noel's journey from perceiving herself as one sex to the sex her brain suggests she was, deserves to be detailed. In 1991 and 1992, J'Noel began electrolysis and then thermolysis to remove body hair on the face, neck, and chest.

J'Noel was married at the time and was married for 5 years. Also, beginning in 1992, J'Noel began taking hormones, and, in 1993, she had a tracheal shave. A tracheal shave is surgery to the throat to change the voice. All the while, J'Noel was receiving therapy and counseling.

"In February 1994, J'Noel had a bilateral orchiectomy to remove the testicles. J'Noel also had a forehead/eyebrow lift at this time and rhinoplasty. Rhinoplasty refers to plastic surgery to alter one's nose. In July 1994, J'Noel consulted with a psychiatrist, who opined that there were no signs of thought disorder or major affective disorder, that J'Noel fully understood the nature of the process of transsexual change, and that her life history was consistent with a diagnosis of transsexualism. The psychiatrist recommended to J'Noel that total sex reassignment was the next appropriate step in her treatment.

"In August 1994, J'Noel underwent further sex reassignment surgery. In this surgery, Eugene Schrang, M.D., J'Noel's doctor, essentially cut and inverted the penis, using part of the skin to form a female vagina, labia, and clitoris. Dr. Schrang, in a letter dated October 1994, stated that J'Noel has a 'fully functional vagina' and should be considered 'a functioning, anatomical female.' In 1995, J'Noel also had cheek implants. J'Noel continues to take hormone replacements.

. . . .

"After the surgery in 1994, J'Noel petitioned the Circuit Court of Outagamie County, Wisconsin, for a new birth certificate which would reflect her new name as J'Noel Ball and sex as female. The court issued a report ordering the state registrar

> to make these changes and issue a new birth certificate. A new birth certificate was issued on September 26, 1994. The birth certificate indicated the child's name as J'Noel Ball and sex as female. J'Noel also has had her driver's license, passport, and health documents changed to reflect her new status. Her records at two universities have also been changed to reflect her new sex designation." 29 Kan.App.2d at 96-98, 22 P.3d 1086.

Before meeting Marshall, J'Noel was married to S.P., a female. J'Noel and S.P. met and began living together in 1980, while J'Noel was in college. They married in 1988. J'Noel testified she and S.P. engaged in heterosexual relations during their relationship. J'Noel believed she was capable of fathering children, and the couple used birth control so S.P. would not become pregnant. J'Noel and S.P. divorced in May 1994.

J'Noel Ball and Marshall Gardiner were married in Kansas in September 1998. Marshall died intestate in August 1999. This legal journey started with Joe filing a petition for letters of administration, alleging that J'Noel had waived any rights to Marshall's estate. J'Noel filed an objection and asked that letters of administration be issued to her. The court then appointed a special administrator. Joe amended his petition, alleging that he was the sole heir in that the marriage between J'Noel and Marshall was void since J'Noel was born a man. J'Noel argues that she is a biological female and was at the time of her marriage to Marshall. There is no dispute that J'Noel is a transsexual.

According to Stedman's Medical Dictionary 1841 (26th ed.1995), a transsexual is a "person with the external

genitalia and secondary sexual characteristics of one sex, but whose personal identification and psychosocial configuration is that of the opposite sex; a study of morphologic, genetic, and gonadal structure may be genitally congruent or incongruent." A post-operative transsexual, such as J'Noel, is a person who has undergone medical and surgical procedures to alter "external sexual characteristics so that they resemble those of the opposite sex." Stedman's Med. Dict. 1841 (26th ed.1995). The external sexual characteristics may include genitalia, body and facial hair, breasts, voice, and facial features.

Joe opposed J'Noel's receiving a spousal share of Marshall's estate on several grounds-waiver, fraud, and void marriage in that J'Noel remained a male for the purpose of the "opposite sex" requirement of K.S.A.2001 Supp. 23-101.

On cross-motions for summary judgment, the district court denied J'Noel's motion by declining to give full faith and credit to J'Noel's Wisconsin birth certificate, which had been amended as to sex and name. Joe's waiver argument was based on a writing that purports to waive J'Noel's interests in Marshall's property. The district court declined to conclude as a matter of law that the writing constituted a waiver. The factual issue of fraud was not decided on summary judgment. The district court granted Joe's motion with regard to the validity of the marriage on the ground that J'Noel is a male.

J'Noel appealed from the district court's entry of summary judgment against her and in Joe's favor. Joe did not cross-appeal. The Court of Appeals affirmed the district court's ruling denying J'Noel's motion for summary judgment. J'Noel did not file a cross-petition for review of

that ruling, and it is not before this court. Since Joe did not file a cross-appeal of the district court's decision on waiver and fraud, those issues are likewise not before the court. The sole issue for review is whether the district court erroneously entered summary judgment in favor of Joe on the ground that J'Noel's marriage to Marshall was void.

On the question of validity of the marriage of a post-operative transsexual, there are two distinct "lines" of cases. One judges validity of the marriage according to the sexual classification assigned to the transsexual at birth. The other views medical and surgical procedures as a means of unifying a divided sexual identity and determines the transsexual's sexual classification for the purpose of marriage at the time of marriage. The essential difference between the two approaches is the latter's crediting a mental component, as well as an anatomical component, to each person's sexual identity.

Among the cases brought to the court's attention not recognizing a mental component or the efficacy of medical and surgical procedures are *Corbett v. Corbett,* 2 All E.R. 33 (1970); *In re Ladrach,* 32 Ohio Misc.2d 6, 513 N.E.2d 828 (1987); and *Littleton v. Prange,* 9 S.W.3d 223 (Tex.Civ.App.1999), *cert. denied* 531 U.S. 872, 121 S.Ct. 174, 148 L.Ed.2d 119 (2000). Recognizing them are *M.T. v. J.T.,* 140 N.J.Super. 77, 355 A.2d 204, *cert. denied* 71 N.J. 345, 364 A.2d 1076 (1976); and *In re Kevin,* FamCA 1074 (File No. SY8136 OF 1999, Family Court of Australia, at Sydney, 2001).

The district court, in the present case, relied on *Littleton.* The Court of Appeals relied on *M.T. In re Kevin* was decided after the Court of Appeals issued its opinion,

and it cites *In re Estate of Gardiner* with approval; review of that case by the full Family Court of Australia has been heard, but an opinion has not yet been issued.

Littleton was the source for the district court's language and reasoning. The Texas court's statement of the issue was: "[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?" 9 S.W.3d at 224. For what purported to be its findings of fact, the district court restated the Texas court's conclusions nearly verbatim (See 9 S.W.3d at 230-31):

> "Medical science recognizes that there are individuals whose sexual self-identity is in conflict with their biological and anatomical sex. Such people are termed transsexuals. . . .
>
> "[T]ranssexuals believe and feel they are members of the opposite sex. . . . J'Noel is a transsexual.
>
> "[T]hrough surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts. Transsexual medical treatment, however, does not create the internal sexual organs of a woman, except for the vaginal canal. There is no womb, cervix or ovaries in the post-operative transsexual female.
>
> "[T]he male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically, a post-operative female transsexual is still a male. . . .
>
> "The evidence fully supports that J'Noel, born male, wants and believes herself to be a woman. She has made every conceivable effort to make herself a female.

> "[S]ome physicians would consider J'Noel a female; other physicians would consider her still a male. Her female anatomy, however, is still all man-made. The body J'Noel inhabits is a male body in all aspects other than what the physicians have supplied.
>
> "From that the Court has to conclude, and from the evidence that's been submitted under the affidavits, as a matter of law, she-J'Noel is a male."

The Court of Appeals found no error in the district court's not giving the Wisconsin birth certificate full faith and credit. 29 Kan.App.2d at 125, 22 P.3d 1086. With regard to the validity of the marriage, the Court of Appeals reversed and remanded for the district court's determination whether J'Noel was male or female, for the purpose of K.S.A.2001 Supp. 23-101, at the time the marriage license was issued. 29 Kan.App.2d at 127-28, 22 P.3d 1086.

The Court of Appeals rejected the reasoning of *Littleton* "as a rigid and simplistic approach to issues that are far more complex than addressed in that opinion." 29 Kan.App.2d at 127, 22 P.3d 1086. The Court of Appeals "look[ed] with favor on the reasoning and the language" of *M.T.* 29 Kan.App.2d at 128, 22 P.3d 1086. The Court of Appeals engaged in the following discussion of the decision in *M.T.*:

> "In *M.T.*, a husband and wife were divorcing, and the issue was support and maintenance. The husband argued that he should not have to pay support to his wife because she was a male, making the marriage void. The issue before the court, similar to that before this court, was whether the marriage of a post-operative male-to-female transsexual and a male was a lawful marriage between a man and a woman. The court found

that it was a valid marriage. 140 N.J.Super. at 90 [355 A.2d 204].

"In affirming the lower court's decision, the court noted the English court's previous decision in *Corbett*. 140 N.J.Super. at 85-86 [355 A.2d 204]. The court rejected the reasoning of *Corbett*, though, finding that 'for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.' 140 N.J.Super. at 87 [355 A.2d 204]. Since the court found that the wife's gender and genitalia were no longer 'discordant' and had been harmonized by medical treatment, the court held that the wife was a female at the time of her marriage and that her husband, then, was obligated to support her. 140 N.J.Super. at 89-90 [355 A.2d 204].

"The importance of the holding in *M.T.* is that it replaces the biological sex test with dual tests of anatomy and gender, where 'for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.' 140 N.J.Super. at 87 [355 A.2d 204].

"The *M.T.* court further stated:

'In this case the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of

> gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did so here. In so ruling we do no more than give legal effect to a *fait accompli,* based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.' 140 N.J.Super. at 89-90 [355 A.2d 204].
>
> "In *M.T.,* the husband was arguing that he did not owe any support because his wife was a man. However, in the record, it was stated that the wife had a sex reassignment operation after meeting the husband. Her husband paid for the operation. The husband later deserted the wife and then tried to get out of paying support to someone he had been living with since 1964 and had been married to for over 2 years." 29 Kan.App.2d at 113-14, 22 P.3d 1086.

In his petition for review, Joe complained that the Court of Appeals failed to "ask the fundamental question of whether a person can actually change sex within the context of K.S.A. 23-101." On the issue of the validity of the marriage, Joe's principal arguments were that the Court of Appeals failed to give K.S.A.2001 Supp. 23-101 its plain and unambiguous meaning and that the Court of Appeals' opinion improperly usurps the legislature's policy-making role.

K.S.A.2001 Supp. 23-101 provides:

> "The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law."

Joe's principal argument is that the statutory phrase is plain and unambiguous. His statements of the issue and his position, however, go beyond the statutory phrase to pin down the time when the two parties are of opposite sex. The plain and unambiguous meaning of K.S.A.2001 Supp. 23-101, according to Joe, is that a valid marriage must be between two persons who are of opposite sex at the time of birth.

Applying the statute as Joe advocates, a male-to-female transsexual whose sexual preference is for women may marry a woman within the advocated reading of K.S.A.2001 Supp. 23-101 because, at the time of birth, one marriage partner was male and one was female. Thus, in spite of the outward appearance of femaleness in both marriage partners at the time of the marriage, it would not be a void marriage under the advocated reading of K.S.A.2001 Supp. 23-101. As the Court of Appeals stated in regard to J'Noel's argument that K.S.A.2001 Supp. 23-101, as applied by the district court, denied her right to marry: "When J'Noel was found by the district court to be a male for purposes of Kansas law, she was denied the right to marry a male. It logically follows, therefore, that

the court did not forbid J'Noel from marrying a female." 29 Kan.App.2d at 126, 22 P.3d 1086.

Joe's fallback argument is that the legislature's intent was to uphold "traditional marriage," interpreting K.S.A.2001 Supp. 23-101 so that it invalidates a marriage between persons who are not of the opposite sex; *i.e.,* a biological male and a biological female.

Joe also contends that the legislature did not intend for the phrase "opposite sex" in K.S.A.2001 Supp. 23-101 to allow for a change from the sexual classification assigned at birth.

The other facet of Joe's argument is that policy questions are for the legislature rather than the courts. In K.S.A.2001 Supp. 23-101 and K.S.A.2001 Supp. 23-115, the legislature declared the public policy of recognizing only marriages between a man and a woman. K.S.A.2001 Supp. 23-115 provides:

> "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman."

The Court of Appeals extensively reviewed cases involving transsexuals from other states and countries. Rather than restate what already has been well stated, the Court of Appeals' discussion of cases is, in part, quoted here:

> "The cases generally fall into three categories: cases dealing with the amendment of identification records, usually birth certificate name and/

or sex changes; cases dealing with discrimination, most pointedly in the workplace; and cases dealing with marriage between a transsexual and a nontranssexual. An additional case which will be discussed deals with transsexuals and competition in sporting events. The analysis will follow the cases chronologically.

"The first case in the United States to deal with transsexualism involved a petition for a change of sex on a birth certificate. In *Mtr. of Anonymous v. Weiner,* 50 Misc.2d 380, 270 N.Y.S.2d 319 (1966), a post-operative transsexual who had assumed the name and role of a female applied to the Bureau of Vital Statistics in the New York City Health Department for a new birth certificate. The Bureau requested guidance from the Board of Health, who, in turn, called on a committee on public health of the New York Academy of Medicine to investigate the issue and make recommendations. The group called on to assist included gynecologists, endocrinologists, cytogeneticists, psychiatrists, and a lawyer.

. . . .

"The transsexual's application in *Weiner* was denied. In a resolution passed by the Board of Health, it was stated that '"'an individual born one sex cannot be changed for the reasons proposed by the request which was made to us. Sex can be changed where there is an error, of course, but not when there is a later attempt to change psychological orientation of the patient and including such surgery as goes with it.'"' 50 Misc.2d at 383 [270 N.Y.S.2d 319].

. . . .

"However, a civil court in New York, in 1968 and then again in 1970, granted an application for a change of name to a post-operative transsexual. *Matter of Anonymous,* 57 Misc.2d 813, 293 N.Y.S.2d 834 (1968); *Matter of Anonymous,* 64 Misc.2d 309, 314 N.Y.S.2d 668 (1970). In the 1968 case of *Anonymous,* a male-to-female transsexual petitioned the court to order the Bureau of Vital Statistics of the Department of Health of the City of New York to change his birth certificate to reflect a name and sex change. Based on New York law, the civil court lacked jurisdiction to change the sex on the birth certificate. 57 Misc.2d at 813-14 [293 N.Y.S.2d 834]. Even so, the court still criticized the findings of the Academy.

"The court noted that all male organs had been removed and that the petitioner could no longer have sex as a male. The court stated that where, with or without medical intervention, the psychological sex and the anatomical sex are 'harmonized,' then the social sex or gender of the individual should conform to the harmonized status of the individual, and if such conformity requires a change in statistical information, the changes should be made. 57 Misc.2d at 816 [293 N.Y.S.2d 834].

"Later, in *Mtr. of Hartin v. Dir. of Bur. of Recs.,* 75 Misc.2d 229, 232, 347 N.Y.S.2d 515 (1973), the appellate court reaffirmed the decision in *Weiner.* We can conclude that as of the filing date of *Hartin,* New York was stating that its birth records should reflect the sex of an individual as determined at birth.

. . . .

"The next case, often cited, but perhaps colored by the fact that the parties lived together only 14 days of their 3 month marriage, is *Corbett v. Corbett,* 2 All E.R. 33 (1970), an English opinion dealing with transsexualism. One of the parties was a male-to-female transsexual and former female impersonator named April Ashley, who married Arthur Corbett. Arthur was a homosexual and transvestite 'prone to all kinds of sexual fantasies and practices.' 2 All. E.R. at 38. An English court in the probate, divorce, and admiralty division ruled that a marriage between a post-operative male-to-female transsexual and a male was void. 2 All. E.R. at 50.

"After the surgery, the respondent had her passport changed to reflect a female name. The respondent also had insurance papers changed to reflect her sex as female. An attempt to change the respondent's birth certificate failed.

"In *Corbett,* some dispute existed as to whether the respondent was 'intersexed,' which was described then as a medical concept meaning 'something between intermediate and indeterminate sex.' 2 All E.R. at 43. The court rejected this notion, finding enough evidence to support the view that the respondent was born a male. 2 All E.R. at 43.

"The court found that biological sex is determined at birth and cannot be changed by natural or surgical means. The respondent's operation, the court stated, cannot affect the true sex. The only cases where the term 'change of sex' is appropriate, the court opined, is when there has been a mistake as to sex at birth that is subsequently revealed in a medical examination. 2 All E.R. at 47.

"In dealing with the argument that it is illogical for the court to treat the respondent as a male while other paperwork may have been changed to say differently, the court declared: 'Marriage is a relationship which depends on sex and not on gender.' 2 All E.R. at 49. The court distinguished marriage from other social situations. 2 All E.R. at 49. Sex is clearly an essential determinant of the relationship in marriage, the court stated, as it is recognized as the union between a man and woman. The court established a three-part test in determining what is a person's sex for purposes of the law, stating:

'Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must . . . be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place . . . the chromosomal, gonadal, and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.' 2 All E.R. at 48.

"The unusual facts and the lack of a relationship in *Corbett* make it of questionable precedential value here. We recognize that it may have been the first time a court addressed these issues in the context of marriage.

"A change in thinking can perhaps be observed beginning in 1975 in *Darnell v. Lloyd,* 395 F.Supp. 1210 (D.Conn.1975). The petitioner, called a male

at birth, had a sex change operation and later requested that the Commissioner of Health change the sex on his birth certificate from male to female. The Commissioner refused to make such a change. The transsexual sued to have the Commissioner ordered to make this change, and the Commissioner moved for summary judgment.

"The court denied the motion for summary judgment, finding that the Commissioner of Health must show some substantial state interest in his policy of refusing to change a birth certificate to reflect *current* sexual status unless that was also the status at birth. 395 F.Supp. at 1214. The court found that this heightened level of scrutiny exists because the court felt that the fundamental right to marry could be implicated by the Commissioner's decision. 395 F.Supp. at 1214.

"The court held that the Commissioner of Health had not met his burden of proof. 395 F.Supp. at 1214. It indicated that the exact anatomical condition of the petitioner at birth was unclear, as were all of the details of the operation and present circumstances. 395 F.Supp. at 1213.

"The case of *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204, *cert. denied* 71 N.J. 345 [364 A.2d 1076] (1976), deserves greater attention, in our view, than *Corbett, Hartin,* or *Darnell.*

"In *M.T.*, a husband and wife were divorcing, and the issue was support and maintenance. The husband argued that he should not have to pay support to his wife because she was a male, making the marriage void. The issue before the court, similar to that before this court, was whether the marriage of a post-operative male-to-female

transsexual and a male was a lawful marriage between a man and a woman. The court found that it was a valid marriage. 140 N.J.Super. at 90 [355 A.2d 204].

"In affirming the lower court's decision, the court noted the English court's previous decision in *Corbett.* 140 N.J.Super. at 85-86 [355 A.2d 204]. The court rejected the reasoning of *Corbett,* though, finding that 'for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.' 140 N.J.Super. at 87 [355 A.2d 204]. Since the court found that the wife's gender and genitalia were no longer 'discordant' and had been harmonized by medical treatment, the court held that the wife was a female at the time of her marriage and that her husband, then, was obligated to support her. 140 N.J.Super. at 89-90 [355 A.2d 204].

"The importance of the holding in *M.T.* is that it replaces the biological sex test with dual tests of anatomy and gender, where 'for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.' 140 N.J.Super. at 87 [355 A.2d 204].

"The *M.T.* court further stated:

'In this case the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified

and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did so here. In so ruling we do no more than give legal effect to a *fait accompli,* based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.' 140 N.J.Super. at 89-90 [355 A.2d 204].

"In *M.T.,* the husband was arguing that he did not owe any support because his wife was a man. However, in the record, it was stated that the wife had a sex reassignment operation after meeting the husband. Her husband paid for the operation. The husband later deserted the wife and then tried to get out of paying support to someone he had been living with since 1964 and had been married to for over 2 years.

"In 1977, the Oregon Supreme Court was faced with the issue of whether a birth certificate of a transsexual should be changed to reflect a different name and sex. *K. v. Health Division,* 277 Or. 371, 560 P.2d 1070 (1977). In *K.,* the court first looked to the statutes regarding birth certificate changes. The court found limited circumstances existed under the law for birth certificate amendments. The amendments, further, only dealt with name changes and only in the case of adoption or if a parent name changes. 277 Or. at 374-75 [560 P.2d 1070].

"Despite the Court of Appeals finding that the birth certificate could be amended, the Oregon Supreme Court held that no such authority existed in Oregon to change the birth certificate to reflect a change in sex or name in this instance. 277 Or. at 374-76 [560 P.2d 1070]. The court stated that 'it has not been demonstrated, by legislative history or otherwise, that it would be "at variance with the apparent policy" of either the legislature or the State Board of Health to deny the issuance of a "new birth certificate" to a transsexual.' 277 Or. at 375 [560 P.2d 1070]. The court further stated:

'In our opinion, it is at least equally, if not more reasonable, to assume that in enacting these statutes it was the intent of the legislature of Oregon that a "birth certificate" is an historical record of the facts as they existed at the time of birth, subject to the specific exceptions provided by statute.' 277 Or. at 375 [560 P.2d 1070].

"In so finding, the Supreme Court declared that 'it is not for this court to decide which view is preferable. On the contrary, we hold that this is a matter of public policy to be decided by the Oregon legislature.' 277 Or. at 376 [560 P.2d 1070].

. . . .

"In 1984, the United States Court of Appeals, Seventh Circuit, analyzed an issue concerning transsexualism and workplace discrimination. In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir.1984), *cert. denied* 471 U.S. 1017 [105 S.Ct. 2023, 85 L.Ed.2d 304] (1985), a post-operative male-to-female transsexual who was a pilot for Eastern Airlines was fired in 1981, shortly after sex reassignment surgery. The transsexual sued

the airline, alleging that the employer violated Title VII by discharging her from her position as a pilot. A federal district court agreed with the transsexual, finding discrimination against this person as both a female and a transsexual, and the airline appealed. 742 F.2d at 1082.

"The Seventh Circuit disagreed with the district court. The court stated that while it does not condone discrimination in any form, it must hold that Title VII does not protect transsexuals. 742 F.2d at 1084. First, the court stated: 'It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning.' 742 F.2d at 1085. The court explained that the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder. It noted that the law clearly prohibits discrimination against women because they are women or men because they are men; it does not protect a person born with a male body who believes himself to be female or a person born with a female body who believes herself to be male. 742 F.2d at 1085.

"After noting that nothing was said in the legislative history about transsexuals, the court stated that it appears clear that Congress did not intend the legislation to apply to anything other than 'the traditional concept of sex.' 742 F.2d at 1085. Had Congress intended it to apply, surely it would have said so, the court explained. 742 F.2d at 1085. Thus, the court declined to expand the definition of 'sex' as used in Title VII beyond its 'common and traditional interpretation,' stating: 'We agree with the Eighth and Ninth Circuits that if the term "sex" as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from

Congress.' 742 F.2d at 1087. See *Sommers v. Budget Marketing, Inc.,* 667 F.2d 748, 750 (8th Cir.1982); *Holloway v. Arthur Andersen & Co.,* 566 F.2d 659, 662-63 (9th Cir.1977).

"The two most recent decisions in the United States in the area of transsexualism have dealt with the precise issue before this court, that is, whether two individuals, biologically and legally of the same sex at birth, may contract to marry each other.

"In 1987, a probate court in Ohio addressed the question in the case of *In re Ladrach,* 32 Ohio Misc.2d 6, 513 N.E.2d 828 (1987). In *Ladrach,* a post-operative male-to-female transsexual and the transsexual's fiancé, a biological male, applied for a marriage license. The application indicated that the transsexual had been married two times before to spouses of the female gender and that both marriages had ended in divorce.

"After reading the application, the clerk at the license bureau called a judge who reviewed the application. The judge also reviewed a signed letter by a physician indicating that the transsexual had undergone sex reassignment surgery. After reviewing the marriage statute in Ohio, the judge concluded that the application must be denied. Later, the transsexual also filed a petition to have the sex corrected on the transsexual's birth certificate to state 'Girl' instead of 'Boy.' This application was dismissed, and the transsexual filed a complaint for declaratory judgment to have the birth certificate changed and the marriage license issued.

"The Ohio Probate Court found that the birth certificate, based on Ohio law, should not be

changed. The court stated that its statute is a 'correction' type statute, which permits a court to correct errors such as spelling of names, dates, race and sex, if in fact there was an error. 32 Ohio Misc.2d at 8 [513 N.E.2d 828]. Since there was no error in the designation of the transsexual as a boy, the application, the court stated, must be dismissed as to the birth certificate change. 32 Ohio Misc.2d at 8 [513 N.E.2d 828].

"The court concluded, after a review of prior case law, law review articles, and the posthearing brief of the applicant, that no authority existed in Ohio for the issuance of a marriage license to a post-operative male-to-female transsexual and a male person. 32 Ohio Misc.2d at 10 [513 N.E.2d 828]. If it is to be the public policy of the state of Ohio to issue marriage license in such cases, the court stated, 'it is this court's opinion that the legislature should change the statutes.' 32 Ohio Misc.2d at 10 [513 N.E.2d 828].

"The most recent decision in the United States regarding transsexualism was decided by the Texas Court of Appeals in *Littleton v. Prange,* 9 S.W.3d 223 (Tex.Civ.App.1999), *cert. denied* 531 U.S. 872 [121 S.Ct. 174, 148 L.Ed.2d 119] (2000). In J'Noel's case, the district court appears to rely heavily on this case in rendering its decision that J'Noel is a male, quoting some of its language verbatim. In *Littleton,* a transsexual, now called Christie, who was born a man but had undergone sex reassignment surgery, brought a medical malpractice suit under Texas' wrongful death statute as a surviving spouse of a male patient. The doctor who was sued filed a motion for summary judgment, asserting that Christie was a male and, therefore, could not be the surviving spouse of another man. The trial court granted

summary judgment to the doctor, and Christie appealed.

"Christie had a name and sex change made on her birth certificate during pendency of the suit. During the surgical procedures, Christie's penis, scrotum, and testicles were removed, and a vagina and labia were constructed. Christie also had breast construction surgery. One of Christie's doctors testified that Christie 'has the capacity to function sexually as a female' after the surgery. 9 S.W.3d at 225. Doctors testified that medically Christie was a woman.

"Christie married a man by the name of Jonathon in 1989, approximately 9 or 10 years after sex reassignment surgery. The two lived together until Jonathon's death in 1996, after which time Christie filed suit against Jonathon's doctor. In Christie's affidavit, Christie asserted that Jonathon knew about Christie's background and sex reassignment surgery.

"The court in *Littleton* stated that in Texas, marriage must be between two parties of the opposite sex. 9 S.W.3d at 225. Further, in order for Christie to sue under the wrongful death statute in Texas, Christie must be the surviving spouse. 9 S.W.3d at 225. Thus, if Christie was a man, summary judgment would be appropriate. After a brief review of what transsexualism is, the court next examined the case law in this area. The court discussed *Corbett* and the case of *Anonymous v. Anonymous,* 67 Misc.2d 982, 325 N.Y.S.2d 499 (1971). The court also referenced such cases as *M.T. v. J.T., In re Ladrach,* and *K. v. Health Division.* 9 S.W.3d at 227-29.

"After a review of the case law, the court concluded that Christie was a male as a matter of law. 9 S.W.3d at 231. The court noted that this was an issue of first impression in Texas. 9 S.W.3d at 230. In line with previous cases, the court stated: '[I]t is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. . . . It would be intellectually impossible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex.' 9 S.W.3d at 230.

"While Christie argued that amputation was '"a pretty important step,'" the court, while agreeing, explained that it had 'no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature.' 9 S.W.3d at 230.

"Thus, the court found that even though surgery and hormones can make a transsexual male look like a woman, including female genitalia, and in Christie's case, even breasts, transsexual medicine does not create the internal sex organs of a woman (except for a man-made vaginal canal). There is no womb, cervix, or ovaries in the post-operative transsexual female. The chromosomes do not change. Biologically, the post-operative female is still a male. 9 S.W.3d at 230. Even though some doctors would consider Christie a female and some a male, the court concluded: 'Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.' 9 S.W.3d at 231.

. . . .

> "A petition for writ of certiorari of the *Littleton* holding was denied by the United States Supreme Court on October 2, 2000." 29 Kan.App.2d at 1100-06, 22 P.3d 1086.

J'Noel submitted a supplemental brief to this court in order to bring to the court's attention a decision of the Family Court of Australia, which is dated October 12, 2001. J'Noel refers to the new decision as *In re Kevin,* FamCA 1074 (File No. SY8136 OF 1999, Family Court of Australia, at Sydney, 2001). In that case, applicants, Kevin and Jennifer, sought a declaration of the validity of their marriage. Kevin (f.k.a. Kimberley) is a female-to-male transsexual. His birth certificate recorded his sex as "female," but Kevin always considered himself to be a male. Kevin met Jennifer in October 1996. He told her of "his transsexual predicament." They began living together in February 1997 and agreed to marry. In November 19[97], Kevin had breast reduction surgery, and in September 1998 he had "a total hysterectomy with bilateral oophorectomy." Slip op. at 8. Kevin has elected not to undergo further surgery involving construction of a penis or testes. Due to hormone treatments, Kevin's voice has deepened and he has coarse hair growth on his face, chest, legs, and stomach. In October 1998, Kevin was issued a new birth certificate showing his sex as "male," and he and Jennifer were married.

Jennifer became pregnant through in vitro fertilization with donated sperm and gave birth in November 1999. The couple plans to have another child in this way. Kevin's history of transsexuality was made known to the infertility clinic where he and Jennifer applied for treatment, and after full consideration by a team of scientists,

physicians, and nurses "'it was decided that Kevin and Jennifer be considered a heterosexual couple with infertility consequent to absent sperm production.'" Slip op. at 10.

Two psychiatrists examined Kevin. Both concluded that Kevin is and always has been psychologically male. One wrote that he believed Kevin's "'brain sex or mental sex is male,'" and then stated his agreement with the opinion of Milton Diamond, an American professor of anatomy and reproductive biology, "'that further research will confirm the present evidence that brain sex or mental sex is a reality which would explain the persistence of a gender identity in the face of or contrary to external influences.'" Slip op. at 11.

The record in the Australian case was richly and comprehensively developed, in sharp contrast with the record in the case before us. In *In re Kevin,* the court had the benefit of the testimony of many people who were colleagues, friends, and family of Jennifer and Kevin, as well as volumes of medical and scientific evidence.

Here, the district court's conclusion of law, based on its findings of fact, was that "J'Noel is a male." In other words, the district court concluded as a matter of law that J'Noel is a male and granted summary judgment on that basis.

The district court stated that it had considered conflicting medical opinions on whether J'Noel was male or female. This is not the sort of factual dispute that would preclude summary judgment because what the district court actually took into account was the medical experts' opinions on the ultimate question. The district court did not take into account the factors on which the scientific experts based their opinions on the ultimate question. The

district court relied entirely on the Texas court's opinion in *Littleton* for the "facts" on which it based its conclusion of law. There were no expert witnesses or medical testimony as to whether J'Noel was a male or female. The only medical evidence was the medical report as to the reassignment surgery attached to J'Noel's memorandum in support of her motion for partial summary judgment. There was included a "To Whom It May Concern" notarized letter signed by Dr. Schrang in which the doctor wrote: "She should now be considered a functioning, anatomical female."

The Court of Appeals found deficiency in the district court's entry of summary judgment. Supplying some of what the district court omitted, the Court of Appeals included in its opinion a review of some scientific literature. As courts typically do, the Court of Appeals also turned to a law journal article that reported on scientific matters relevant to legal issues. The Court of Appeals quoted extensively from Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology,* 41 Ariz. L.Rev. 265, 278-92 (1992). 29 Kan.App.2d at 101-09, 22 P.3d 1086. Professor Greenberg's thesis is that sexual identification is not simply a matter of anatomy, as demonstrated by a number of intersex conditions – chromosomal sex disorders, gonadal sex disorders, internal organ anomalies, external organ anomalies, hormonal disorders, gender identity disorder, and unintentioned amputation.

Thus, the essential difference between the line of cases, including *Corbett* and *Littleton,* that would invalidate the Gardiner marriage and the line of cases, including *M.T.* and *In re Kevin,* that would validate it is that the former treats a person's sex as a matter of law and the

latter treats a person's sex as a matter of fact. In *Littleton,* the thread running throughout the majority's opinion was that a person's gender was immutably fixed by our Creator at birth. 9 S.W.3d at 224. Summing up its view of Christie's mission to be accepted as a male, the court stated: "There are some things we cannot will into being. They just are." 9 S.W.3d at 231. *Corbett* was approvingly described by the Texas majority as holding, "once a man, always a man." 9 S.W.3d at 227. The Texas court decided that there was nothing for a jury to decide, and "[t]here are no significant facts that need to be decided." 9 S.W.3d at 230. Because "Christie was created and born a male," the Texas court "h[e]ld, *as a matter of law,* that Christie Littleton is a male." (Emphasis added.) 9 S.W.3d at 231.

In contrast, the Australian court stated:

> "It will be necessary to identify whether particular propositions in the reasoning are statements of fact or of law. I take it to be a question of law what criteria should be applied in determining whether a person is a man or a woman for the purpose of the law of marriage, and a question of fact whether the criteria exist in a particular case." *In re Kevin,* slip op. at 17.

The Australian court's analytical approach echoes that of our Court of Appeals. Indeed, *Gardiner* is cited and discussed by the Australian court. Slip op. at 44-45, 51-52.

The Court of Appeals rejected the district court's sex-at-birth-answers-the-question rationale in part, at least, because the Court of Appeals opined that there are a number of factors that make sexual identification at birth less than certain. In chromosomal sex disorders, the chromosomal pattern does not fit into the XX and XY

binary system. Among the chromosomal sex disorders described by Greenberg are Klinefelter Syndrome, which affects approximately 1 in 500 to 1,000 babies identified at birth as males based on the appearance of external genitalia, in which multiple X chromosomes may become manifest in puberty with breast development. Turner Syndrome affects babies identified at birth as females, who in fact typically have only one X chromosome. As a result, a person with Turner Syndrome will have female appearing genitalia but may have unformed and nonfunctioning gonads. What the district court said about J'Noel, that "[t]here is no womb, cervix or ovaries," also could be true for a person with Turner Syndrome who had been identified as a female at birth. Other anomalies and conditions that could not be accounted for in the district court's approach are discussed in the Court of Appeals' quotation of Greenberg at 29 Kan.App.2d at 103-07, 22 P.3d 1086. However, that is not the issue that is before this court in this appeal.

The district court concluded as a matter of law that J'Noel was a male because she had been identified on the basis of her external genitalia at birth as a male. The Court of Appeals held that other criteria should be applied in determining whether J'Noel is a man or a woman for the purpose of the law of marriage and remanded in order for the district court to apply the criteria to the facts of this case. In this case of first impression, the Court of Appeals adopted the criteria set forth by Professor Greenberg in addition to chromosomes: "gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity," as well as other criteria that may emerge

with scientific advances. 29 Kan.App.2d at 127, 22 P.3d 1086.

The harmonizing of psychological and anatomical sex was the touchstone for the New Jersey court. It also was the touchstone for the Australian court. The New Jersey court reasoned that a person who has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled psychological sexual attributes should be considered a member of the reassigned sex for marital purposes:

> "In this case the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did do so here. In so ruling we do no more than give legal effect to a *fait accompli,* based upon medical judgment and action which are irreversible." *M.T.,* 140 N.J.Super. at 89-90, 355 A.2d 204.

The Australian court, too, concluded that the law should treat post-operative transsexuals as members of their reassigned sex. Critical to the court's determination was successful reassignment surgery.

On appeal, J'Noel argues that the marriage is valid under Kansas law. However, in the district court, J'Noel's sole argument was that the marriage was valid under

Wisconsin law and Kansas must give full faith and credit to Wisconsin law. In fact, J'Noel argued that the validity of the marriage under Kansas law was not an issue in this case and intimated the marriage would be prohibited under K.S.A.2001 Supp. 23-101. She argued, in part:

> "The way that counsel for Joe Gardiner portrayed this issue, I think, is perhaps very clever and it's probably something that I would have done if I were in his shoes. He said, can someone change their sex? Does a medical doctor or a judge have the right to change somebody's sex?
>
> "And the answer to that may, in fact, be no, but I think the more interesting question, and the question that's really before the Court is one which I think was addressed by Counsel, and that is – perhaps that is an issue for the State legislature to deal with. In Wisconsin the State legislature has clearly held this issue. The statute in Wisconsin is clear, and this statute has been cited in the brief.
>
> . . . .
>
> "However, we would urge the Court to rule on our motion favorably with respect to the sexual identity of Miss Gardiner and we would urge the Court to rule that as a matter of summary judgment she is, in fact, a female entitled, under the listed very narrow interpretation of Wisconsin law.
>
> . . . .
>
> " . . .Does this, in fact, make J'Noel Gardiner a man-from a man to a woman?
>
> "I think the answer is, well, no, not technically speaking, but we're not talking about technically.

We're talking about that as a matter of law, not technically, not talking scientifically. . . .

"In this case, the Wisconsin legislature clearly contemplated a person who had sexual reassignment surgery is allowed to change her sexual identity in conformance with the surgery that transpired.

. . . .

"Going onto the sexual identity question, I think that counsel for Joe Gardiner have very cleverly tried to posture the questions differently than it actually exists. This is really a very simple, straightforward matter. The question is, does Kansas need to give full faith and credit to the Wisconsin statute and court order and the birth certificate that order created under Wisconsin law?

"I think the answer to that is clearly yes. This Court is not being asked to determine whether or not J'Noel Gardiner is, in fact, a male or female. That is simply not a matter that is before this Court on this motion for summary judgment, and we would submit even at the time of trial. Surgeons may testify as to certain scientific facts and they may disagree as to whether or not that Miss Gardiner is, in fact, a male or a female.

. . . .

"There is no need for this Court to make a decision of whether or not Miss Gardiner is in fact, a man or a woman. That's simply not a matter before this Court. The issue is whether or not Wisconsin is allowed to create their own laws and whether those laws and those decisions made by a Wisconsin tribunal and the administrative acts

> that follow that court order are in fact something that this Court is bound to follow.
>
> . . . .
>
> "[W]e're not asking the Court to approve or disapprove of issues that relate to transsexuals marrying. We really encourage the Court to look at the very, very narrow issue here.
>
> "Clearly, there's issues for the Kansas legislature to look at, and I don't think this Court or any other Court in Kansas should impose its own opinions on the legislature, but I think this Court does have a responsibility to enforce the law as it applies in other states to Kansas and give those other states full faith and credit."

The district court granted summary judgment, finding the marriage void under K.S.A.2001 Supp. 23-101. Summary judgment is appropriate when there is no genuine issue of material fact. *Bergstrom v. Noah,* 266 Kan. 847, 871, 974 P.2d 531 (1999). Here, the parties have supplied and agreed to the material facts necessary to resolve this issue. There are no disputed material facts. We disagree with the decision reached by the Court of Appeals. We view the issue in this appeal to be one of law and not fact. The resolution of this issue involves the interpretation of K.S.A.2001 Supp. 23-101. The interpretation of a statute is a question of law, and this court has unlimited appellate review. *State v. Lewis,* 263 Kan. 843, 847, 953 P.2d 1016 (1998).

The fundamental rule of statutory construction is that the intent of the legislature governs. In determining legislative intent, courts are not limited to consideration of the language used in the statute, but may look to the historical background of the enactment, the circumstances

attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. *Sowers v. Tsamolias,* 23 Kan.App.2d 270, 273, 929 P.2d 188 (1996). Words in common usage are to be given their natural and ordinary meaning. *State v. Heffelman,* 256 Kan. 384, 886 P.2d 823 (1994). When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. *In re Marriage of Killman,* 264 Kan. 33, 42-43, 955 P.2d 1228 (1998).

The words "sex," "male," and "female" are words in common usage and understood by the general population. Black's Law Dictionary, 1375 (6th ed.1999) defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female." Webster's New Twentieth Century Dictionary (2nd ed.1970) states the initial definition of sex as "either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively." "Male" is defined as "designating or of the sex that fertilizes the ovum and begets offspring: opposed to *female.*" "Female" is defined as "designating or of the sex that produces ova and bears offspring: opposed to *male.*" [Emphasis added.] According to Black's Law Dictionary, 972 (6th ed.1999) a marriage "is the legal status, condition, or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."

The words "sex," "male," and "female" in everyday understanding do not encompass transsexuals. The plain,

ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to "produce ova and bear offspring" does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the *Littleton* court noted, the transsexual still "inhabits . . . a male body in all aspects other than what the physicians have supplied." 9 S.W.3d at 231. J'Noel does not fit the common meaning of female.

That interpretation of K.S.A.2001 Supp. 23-101 is supported by the legislative history of the statute. That legislative history is set out in the Court of Appeals decision:

> "The amendment to 23-101 limiting marriage to two parties of the opposite sex began its legislative history in 1975. The minutes of the Senate Committee on Judiciary for January 21, 1976, state that the amendment would 'affirm the traditional view of marriage.' The proposed amendment was finally enacted in 1980.
>
> "K.S.A. 23-101 was again amended in 1996, when language was added, stating: 'All other marriages are declared to be contrary to the public policy of this state and are void.' This sentence was inserted immediately after the sentence limiting marriage to two parties of the opposite sex.
>
> "In 1996, K.S.A. 23-115 was amended, with language added stating: 'It is the strong public policy of this state only to recognize as valid marriages from other states that are between a

> man and a woman.'" 29 Kan.App.2d at 99, 22 P.3d 1086.

The Court of Appeals then noted:

> "The legislative history contains discussions about gays and lesbians, but nowhere is there any testimony that specifically states that marriage should be prohibited by two parties if one is a post-operative male-to-female or female-to-male transsexual. Thus, the question remains: Was J'Noel a female at the time the license was issued for the purpose of the statute?" 29 Kan.App.2d at 100, 22 P.3d 1086.

We do not agree that the question remains. We view the legislative silence to indicate that transsexuals are not included. If the legislature intended to include transsexuals, it could have been a simple matter to have done so. We apply the rules of statutory construction to ascertain the legislative intent as expressed in the statute. We do not read into a statute something that does not come within the wording of the statute. *Joe Self Chevrolet, Inc. v. Board of Sedgwick County Comm'rs,* 247 Kan. 625, 633, 802 P.2d 1231 (1990).

In *Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081 (7th Cir.1984), the federal district court, like the Court of Appeals here, held sex identity was not just a matter of chromosomes at birth, but was in part a psychological, self-perception, and social question. In reversing the district court, the Seventh Circuit stated:

> "In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden

the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. See *Gunnison v. Commissioner,* 461 F.2d 496, 499 (7th Cir.1972) (it is for the legislature, not the courts, to expand the class of people protected by a statute). This we must not and will not do.

"Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term 'sex' as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word 'sex' as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof. If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation." 742 F.2d at 1086.

We agree with the Seventh Circuit's analysis in *Ulane.* It is well reasoned and logical. Although *Ulane* involves sex discrimination against Ulane as a transsexual and as a female under Title VII, the similarity of the basic issue and facts to the present case make it both instructive and persuasive. As we have previously noted, the legislature clearly viewed "opposite sex" in the narrow traditional sense. The legislature has declared that the public policy of this state is to recognize only the traditional marriage

between "two parties who are of the opposite sex," and all other marriages are against public policy and void. We cannot ignore what the legislature has declared to be the public policy of this state. Our responsibility is to interpret K.S.A.2001 Supp. 23-101 and not to rewrite it. That is for the legislature to do if it so desires. If the legislature wishes to change public policy, it is free to do so; we are not. To conclude that J'Noel is of the opposite sex of Marshall would require that we rewrite K.S.A.2001 Supp. 23-101.

Finally, we recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male for purposes of marriage under K.S.A.2001 Supp. 23-101. We are not blind to the stress and pain experienced by one who is born a male but perceives oneself as a female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal. However, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court.

The Court of Appeals is affirmed in part and reversed in part; the district court is affirmed.

DAVIS, J., not participating.

BRAZIL, S.J., assigned.

22 P.3d 1086

Court of Appeals of Kansas.

In the Matter of the ESTATE OF
Marshall G. GARDINER, Deceased.

No. 85,030.

May 11, 2001.

Sanford P. Krigel and *Karen S. Rosenberg*, of Krigel & Krigel, P.C., of Kansas City, MO, for appellant J'Noel Gardiner.

William M. Modrcin and *David G. Watkins*, of Morrison & Hecker L.L.P., of Kansas City, MO, and *John F. Thompson*, of Davis, Beall, McGuire & Thompson, of Leavenworth, for appellee Joseph M. Gardiner, III.

Lisa Nathanson, of American Civil Liberties Union of Kansas and Western Missouri, of Kansas City, MO, for amicus curiae ACLU of Kansas and Western Missouri, and Doni Gewirtzman, *Ruth E. Harlow, Beatrice Dohrn*, and Evan Wolfson, of Lambda Legal Defense and Education Fund, Inc., of New York, NY, and Pamela Sumners, of American Civil Liberties Union of Illinois, of Chicago, IL, for amicus curiae Gender Public Advocacy Coalition.

Aronda Strutt Kerns, of Wichita, and Patrick T. Gillen, of Thomas More Center for Law & Justice, of Ann Arbor, MI, for amicus curiae Thomas More Center for Law & Justice.

Before *GERNON*, P.J., *KNUDSON* and BEIER, JJ.

GERNON, P.J.:

This is an appeal from an order issued by the district court granting summary judgment to Joseph M. Gardiner,

III, (Joe) finding the marriage between Joe's father, Marshall G. Gardiner, and J'Noel Gardiner to be void under Kansas law and denying partial summary judgment to J'Noel. We reverse and remand with instructions.

We note that this is the type of case in which the courts are required not only to weigh the legal issues but also to weigh the overlapping and sometimes conflicting positions of the parties and various interested groups. We acknowledge the several briefs filed by each side and the *amicus curiae* briefs filed by the Gender Public Advocacy Coalition/American Civil Liberties Union of Kansas and Western Missouri and The Thomas More Center for Law & Justice. Each has been helpful.

Some cases lend themselves to precise definitions, categories, and classifications. On occasion, issues or individuals come before a court which do not fit into a bilateral set of classifications. Questions of this nature highlight the tension which sometimes exists between the legal system, on the one hand, and the medical and scientific communities, on the other. Add to those concerns those whose focus is ethics, religion, lifestyle, or human rights, and the significance of a single decision is amplified. We recognize that this may be such a case.

We concur with the observation made by the Supreme Court of Vermont when it wrote:

> "It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole

organizing principle." *In re B.L.V.B.,* 160 Vt. 368, 376, 628 A.2d 1271 (1993).

I-Marriage Issue

I-A Court Procedural Background

Marshall died intestate on August 12, 1999. He was a resident of Leavenworth County, Kansas.

Joe filed a petition for letters of administration with the District Court of Leavenworth County, Kansas. Joe named himself and J'Noel, Marshall's surviving spouse, as Marshall's heirs. In his petition, Joe argued that J'Noel had waived any rights to Marshall's estate, and, thus, he was the sole heir-at-law to Marshall.

J'Noel filed an objection to Joe's petition. J'Noel also applied for letters of administration. The court then appointed a special administrator to handle the estate. Joe filed an objection to J'Noel's application.

Joe then petitioned the district court to amend his pleadings. In his amended petition, Joe named himself as Marshall's sole heir. Joe denied that Marshall and J'Noel were validly married. He contended that J'Noel was previously known as Jay N. Ball and was born a man. He argued that despite surgery, a name change, and other steps taken by J'Noel to change sex, she remains a man for the purposes of Kansas law relating to the issuance of a marriage license. Joe argued that the marriage between Marshall and J'Noel is void since, pursuant to K.S.A.2000 Supp. 23-101, marriages between persons of the same sex are prohibited. Therefore, Joe claimed, J'Noel had no right to a share of Marshall's estate as the surviving spouse.

Joe also argued fraud regarding the waiver of J'Noel's rights and fraud in the inducement to marry in that Marshall did not know J'Noel was born a man. Even if the purported marriage was valid, he stated, J'Noel executed a waiver of any interest in Marshall's assets. Joe also alleged that a premarital agreement was entered into by both parties.

J'Noel filed a response to Joe's objection to her petition for issuance of letters. In the response, J'Noel asserted that her marriage to Marshall was valid. J'Noel argued that she is a biological female, and, as such, under K.S.A.2000 Supp. 23-101, she is not prohibited from marrying Marshall, a biological male. J'Noel also stated that there is no evidence that she, through a memo written to Marshall, intended to waive any interest in Marshall's property and that no premarital agreement was ever entered into by her and Marshall. J'Noel further asserted that she told Marshall about the sex reassignment surgery she had undergone before the marriage.

Joe moved for summary judgment on the basis of waiver and estoppel and the invalidity of the marriage between J'Noel and Marshall under K.S.A.2000 Supp. 23-101 due to fraud. J'Noel moved for partial summary judgment on the issue of whether she is legally a female and was a female at the time of the marriage to Marshall. In a memorandum in support of her motion, J'Noel argued that the district court is required to give full faith and credit to the Wisconsin court order changing her sex to female on her birth certificate and to the new birth certificate that was issued.

The district court heard oral arguments on the motions. The court denied Joe's motion with respect to the

waiver and estoppel, finding disputed facts in that issue. However, the court granted Joe's motion with respect to the issue of the validity of the marriage, finding that J'Noel was born a male and remains a male for purposes of marriage under Kansas law.

The court found that the marriage between J'Noel and Marshall is void under K.S.A.2000 Supp. 23-101, that J'Noel is not Marshall's surviving spouse, and therefore, that J'Noel is not entitled to a spousal share under the laws of intestate succession.

The court then stated that J'Noel has no interest in or right to Marshall's estate. Accordingly, J'Noel's motion for partial summary judgment was denied. J'Noel appeals.

I-B Personal Background

J'Noel was born in Green Bay, Wisconsin. J'Noel's original birth certificate indicates J'Noel was born a male. The record shows that after sex reassignment surgery, J'Noel's birth certificate was amended in Wisconsin, pursuant to Wisconsin statutes, to state that she was female. J'Noel argued that the order drafted by a Wisconsin court directing the Department of Health and Social Services in Wisconsin to prepare a new birth record must be given full faith and credit in Kansas.

Marshall was a businessman in northeast Kansas who had accumulated some wealth. He had one son, Joe, from whom he was estranged. Marshall's wife had died some time before he met J'Noel. There is no evidence that Marshall was not competent. Indeed, both Marshall and J'Noel possessed intelligence and real world experience.

J'Noel had a Ph.D in finance and was a teacher at Park College.

J'Noel met Marshall while on the faculty at Park College in May 1998. Marshall was a donor to the school. After the third or fourth date, J'Noel testified that Marshall brought up marriage. J'Noel wanted to get to know Marshall better, so they went to Utah for a trip. When asked about when they became sexually intimate, J'Noel testified that on this trip, Marshall had an orgasm. J'Noel stated that sometime in July 1998, Marshall was told about J'Noel's prior history as a male. The two were married in Kansas on September 25, 1998.

There is no evidence in the record to support Joe's suggestion that Marshall did not know about J'Noel's sex reassignment. It had been completed years before Marshall and J'Noel met. Nor is there any evidence that Marshall and J'Noel were not compatible.

Both parties agree that J'Noel has gender dysphoria or is a transsexual. J'Noel agrees that she was born with male genitalia. In a deposition, J'Noel testified that she was born with a "birth defect" – a penis and testicles. J'Noel stated that she thought something was "wrong" even prepuberty and that she viewed herself as a girl but had a penis and testicles.

J'Noel's journey from perceiving herself as one sex to the sex her brain suggests she was, deserves to be detailed. In 1991 and 1992, J'Noel began electrolysis and then thermolysis to remove body hair on the face, neck, and chest. J'Noel was married at the time and was married for 5 years. Also, beginning in 1992, J'Noel began taking hormones, and, in 1993, she had a tracheal shave. A tracheal shave is surgery to the throat to change the voice.

All the while, J'Noel was receiving therapy and counseling.

In February 1994, J'Noel had a bilateral orchiectomy to remove the testicles. J'Noel also had a forehead/eyebrow lift at this time and rhinoplasty. Rhinoplasty refers to plastic surgery to alter one's nose. In July 1994, J'Noel consulted with a psychiatrist, who opined that there were no signs of thought disorder or major affective disorder, that J'Noel fully understood the nature of the process of transsexual change, and that her life history was consistent with a diagnosis of transsexualism. The psychiatrist recommended to J'Noel that total sex reassignment was the next appropriate step in her treatment.

In August 1994, J'Noel underwent further sex reassignment surgery. In this surgery, Eugene Schrang, M.D., J'Noel's doctor, essentially cut and inverted the penis, using part of the skin to form a female vagina, labia, and clitoris. Dr. Schrang, in a letter dated October 1994, stated that J'Noel has a "fully functional vagina" and should be considered "a functioning, anatomical female." In 1995, J'Noel also had cheek implants. J'Noel continues to take hormone replacements.

Regardless of whether one agrees with the concept of sex reassignment, one must be impressed with the resolve of, and have compassion for, any human being who undergoes such a demanding set of procedures.

After the surgery in 1994, J'Noel petitioned the Circuit Court of Outagamie County, Wisconsin, for a new birth certificate which would reflect her new name as J'Noel Ball and sex as female. The court issued a report ordering the state registrar to make these changes and issue a new birth certificate. A new birth certificate was

issued on September 26, 1994. The birth certificate indicated the child's name as J'Noel Ball and sex as female. J'Noel also has had her driver's license, passport, and health documents changed to reflect her new status. Her records at two universities have also been changed to reflect her new sex designation.

I-C The Kansas Statute: K.S.A.2000 Supp. 23-101

J'Noel argues that the district court erred when it held that her marriage to Marshall violated K.S.A.2000 Supp. 23-101. J'Noel argues that the legislature, through the language in K.S.A.2000 Supp. 23-101, intended to prohibit only homosexual marriages and that her marriage to Marshall was not such a marriage.

K.S.A.2000 Supp. 23-101 states:

> "The marriage contract is to be considered in law as a civil contract *between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void.* The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law." (Emphasis added.)

For purposes of marriage under Kansas law, the district court found that J'Noel was born and remains a male. Since the statute requires that a marriage must be between two parties of the opposite sex, the court found that the marriage between J'Noel and Marshall was void because both individuals were males.

There is no dispute that the legislature meant to void any marriage between members of the same sex.

The question here is whether J'Noel should have been considered a female under Kansas law at the time the marriage license was issued. Subparts to that question are the criteria used to determine sex and the timing of the determination. Stated another way: Is this marriage, between a post-operative male-to-female transsexual and a male, prohibited under Kansas law?

The interpretation of a statute is a question of law for which appellate review is unlimited. *Rose & Nelson v. Frank,* 25 Kan.App. 2d 22, 24, 956 P.2d 729, *rev. denied* 265 Kan. 886 (1998).

The amendment to 23-101 limiting marriage to two parties of the opposite sex began its legislative history in 1975. The minutes of the Senate Committee on Judiciary for January 21, 1976, state that the amendment would "affirm the traditional view of marriage." The proposed amendment was finally enacted in 1980.

K.S.A. 23-101 was again amended in 1996, when language was added, stating: "All other marriages are declared to be contrary to the public policy of this state and are void." This sentence was inserted immediately after the sentence limiting marriage to two parties of the opposite sex.

In 1996, K.S.A. 23-115 was amended, with language added stating: "It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman."

The legislative history contains discussions about gays and lesbians, but nowhere is there any testimony that

specifically states that marriage should be prohibited by two parties if one is a post-operative male-to-female or female-to-male transsexual. Thus, the question remains: Was J'Noel a female at the time the license was issued for the purpose of the statute?

I-D The Science

It is perhaps well to pause and attempt to define what a transsexual is by stating what a transsexual is not. A transsexual is not a homosexual. A homosexual is one who prefers the same sex for sexual contact. Nor is a transsexual a transvestite. A transvestite is one who remains one sex but gains pleasure from dressing like the other sex. A transsexual is one who experiences himself or herself as being of the opposite sex, despite having some biological characteristics of one sex, or one whose sex has been changed externally by surgery and hormones. A transsexual might be a homosexual or a transvestite also, but one does not define the other.

The scientific literature relating to studies of transsexuals is limited both in scope and history. Serious inquiry is limited to approximately the last 30 years. To state that we know everything about this issue is wrong. To state that we know more and more every year about this complex issue is more accurate. This case has the benefit of some research which preceding cases on this issue did not.

A recent study that autopsied the brains of transsexuals and others supports a conclusion that there is a scientific basis for J'Noel's assertion that she was born with a condition – specifically that she had a penis and testicles, which was evidence that she was male, but in most other

senses of the word, she was female. The same science which allows us to map the genome and explore our DNA requires us to recognize these discoveries in all aspects of our lives, including the legal ramifications. We can no longer be permitted to conclude who is male or who is female by the amount of facial hair one has or the size of one's feet.

A study in the respected medical journal, The Journal of Clinical Endocrinology & Metabolism, analyzed the brains of homosexual males, heterosexual males, heterosexual females, and male-to-female transsexuals. It concluded:

> "Regardless of sexual orientation, men had almost twice as many somatostatin neurons as women. The number of neurons in . . . male-to-female transsexuals was similar to that of the females . . . . In contrast, the neuron number of female-to-male transsexual was found to be in the male range . . . . The present findings of somatostatin neuronal sex differences in the BSTc (a part of the brain) and its sex reversal in the transsexual brain clearly support the paradigm that in transsexuals sexual differentiation of the brain and genitals may go into opposite directions and point to a neurobiological basis of gender identity disorder." Kruijver, Zhou, Pool, Hofman, Gooren, and Swaab, *Male to Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus,* 85 The Journal of Clinical Endocrinology & Metabolism 2034 (2000).

We would be remiss if we did not recognize and mention other medical and scientific information which underscores the complexity of these issues and requires our introspection.

If one concludes that chromosomes are all that matter and that a person born with "male" chromosomes is and evermore shall be male, then one must confront every situation which does not conform with such a rigid framework of thought. There are situations of ambiguity in which certain individuals have chromosomes that differ from the typical pattern. The questions which must be asked, if not answered, are: "Are these people male or female?" and, "Should they be allowed to get married?"

Professor Julie A. Greenberg, writing in the Summer 1999 issue of the Arizona Law Review, states:

> "Medical experts recognize that many factors contribute to the determination of an individual's sex. According to medical professionals, the typical criteria of sex include:
>
> 1. Genetic or chromosomal sex – XY or XX;
>
> 2. Gonadal sex (reproductive sex glands) – testes or ovaries;
>
> 3. Internal morphologic sex (determined after three months gestation) – seminal vesicles/prostrate [*sic*] or vagina/uterus/fallopian tubes;
>
> 4. External morphologic sex (genitalia) – penis/scrotum or clitoris/labia;
>
> 5. Hormonal sex – androgens or estrogens;
>
> 6. Phenotypic sex (secondary sexual features) – facial and chest hair or breasts;
>
> 7. Assigned sex and gender of rearing; and
>
> 8. Sexual identity.

"For most people, these factors are all congruent, and one's status as a man or woman is uncontroversial. For intersexuals, some of these factors may be incongruent, or an ambiguity within a factor may exist.

"'The assumption is that there are two separate roads, one leading from XY chromosomes at conception to manhood, the other from XX chromosomes at conception to womanhood. The fact is that there are not two roads, but one road with a number of forks that turn in the male or female direction. Most of us turn in the same direction at each fork.'

"The bodies of the millions of intersexed people have taken a combination of male and female forks and have followed the road less traveled. These individuals have noncongruent sexual attributes. For these individuals, the law must determine which of the eight sexual factors will determine their sex and whether any one factor should be dispositive for all legal purposes.

"Because the law has typically looked to biology and the medical community for guidance in determining how an individual's sex should be legally established, the complex nature of sexual differentiation must be understood. . . .

"A. Sexual Differentiation – The Typical Path

"During the first seven weeks after conception, all human embryos are sexually undifferentiated. At seven weeks, the embryonic reproductive system consists of a pair of gonads that can grow into either ovaries (female) or testes (male). The genital ridge that exists at this point can develop either into a clitoris and labia (female) or a penis

and a scrotum (male). Two primordial duct systems also exist at this stage. The female ducts are called Mullerian ducts and develop into the uterus, fallopian tubes and the upper part of the vagina if the fetus follows a female path. The male ducts are called Wolffian ducts and are the precursors of the seminal vesicles, vas deferens and epididymis.

"At eight weeks, the fetus typically begins to follow one sex path. If the fetus has one X and one Y chromosome (46XY), it will start down the male path. At eight weeks, a 'master switch' on the Y chromosome, called the testis-determining factor, signals the embryonic gonads to form into testes. The testes begin to produce male hormones. These male hormones prompt the gonads and genitalia to develop male features. Additionally, the testes produce a substance called Mullerian inhibiting factor that causes the female Mullerian ducts to atrophy and be absorbed by the body, so that a female reproductive system is not created.

"Because the typical female fetus is 46XX and does not have a Y chromosome, the master switch that leads to the development of male organs is not turned on. The fetus continues on what is considered the default path and in the thirteenth week the gonads start to transform into ovaries. Because no testes exist to produce male hormones, the remainder of the sexual system develops along a female path. During this time, the Wolffian (male) ducts shrivel up. In other words, unless the body is triggered by hormonal production to follow the male path, the fetus will normally develop as a female. Therefore, although chromosomes generally control the hormones that are produced, it is actually the

hormones that directly affect sexual development.

. . . .

"B. Sexual Differentiation-Intersexuals: The Paths Less Followed

"Two circumstances may lead to an intersexual condition: (1) failure to meet the typical criteria within any one factor; or (2) one or more factors may be incongruent with the other factors.

"1. *Ambiguity Within a Factor*

"a. Chromosomal Ambiguity – Certain individuals have chromosomes that differ from the typical pattern of either XY or XX. Doctors have discovered people with a variety of combinations including: XXX, XXY, XXXY, XYY, XYYY, XYYYY, and XO.

"b. Gonadal Ambiguity – Some intersexuals do not have typical ovaries or testes. Instead, they have 'streak' gonads that do not appear to function as either ovaries or testes. Others have ovotestes, a combination of both male and female gonads. Still others have one ovary and one testis.

"c. External Morphologic Sex – Some individuals' external genitalia are neither clearly male nor clearly female. In addition, some women have clitoral hypertrophy, a clitoris that is larger than the typical clitoris, may more closely resemble a penis, and is sometimes accompanied by an internal vagina.

"d. Internal Morphologic Sex – Some individuals have incomplete internal sex organs or a complete absence of an internal sex organ. In addition, some individuals are born with a combination of male and female internal organs.

"e. Hormonal Sex – The male hormones are referred to as androgens. The female hormones are estrogen and progesterone. Although they are referred to as male and female hormones, all human sex hormones are shared by men and women. Typically, men and women have hormones of each type, but the levels of production and reception of each hormone are highly variable among all individuals. Different medical disorders further influence levels of hormone production and/or reception.

"f. Phenotypic Sex – Individuals may have a variety of combinations of incongruent phenotypic characteristics. In other words, an individual may have characteristics that are typically associated with a male (heavy facial hair) and characteristics that are typically associated with a female (developed breasts).

"g. Assigned Sex/Gender of Rearing – Although it occurs rarely, some parents have raised their child as a gender other than the sex that was assigned by the medical attendant at birth. In addition, in some circumstances, doctors have recommended that a child be raised as the sex different from the one assigned at birth.

"h. Sexual Identity – Sexual identity refers to how individuals would identify themselves; gender identity refers to how society would identify an individual. Some individuals do not consider

themselves to be either male or female; they identify themselves as a third sex.

"2. *Ambiguity Among Factors*

"Some individuals have an incongruence among the eight factors due to a sexual differentiation disorder. In other words, some factors may be clearly male, some may be clearly female, and others may be a mixture of male and female. Incongruity among factors can result from a number of disorders and circumstances including:

a. Chromosomal sex disorders;

b. Gonadal sex disorders;

c. Internal organ anomalies;

d. External organ anomalies;

e. Hormonal disorders;

f. Gender identity disorders; and

g. Surgical creation of an intersexed condition.

"These conditions are described in detail below. . . .

"a. Chromosomal Sex Disorders

"*Klinefelter Syndrome*

"Approximately one in 500 to 1000 'males' is affected by Klinefelter Syndrome, a condition in which a mostly phenotypic male does not fall neatly into the XY chromosome complement. Individuals with Klinefelter Syndrome will typically have two or more X chromosomes. The testes, and often the penis, are smaller than in unaffected XY males.

"A diagnosis of Klinefelter Syndrome is typically not made before puberty because no easily identifiable sign exists prior to the onset of puberty. The swelling of the breasts (gynecomastia) that occurs in adolescence is typically the first sign of the existence of this intersexual condition. Most individuals with Klinefelter Syndrome report a male psychosexual orientation. Many take supplemental testosterone, which further results in a male phenotype (*e.g.* facial hair).

"*Turner Syndrome*

> "Disorders of chromosomal sex also appear in phenotypic females. Turner Syndrome is a condition that affects approximately one in 5000 newborn females. Individuals with Turner Syndrome will typically have an XO chromosomal pattern, not falling neatly into the XX, XY binary system. Individuals with Turner Syndrome typically have bilateral 'streak' gonads (unformed and nonfunctioning gonads) instead of clearly defined ovaries or testes. The absence of complete ovaries or testes in-utero means that the fetus has little exposure to either female or male hormones. In the absence of male hormones, the fetus will follow the female path.

"Individuals with Turner Syndrome are typically shorter than XX females. They have female appearing genitalia, but little breast development in the absence of exogenous estrogen administration.

"b. Gonadal Sex Disorders – Swyer Syndrome

"Pure gonadal dysgenesis is a condition sometimes referred to as Swyer Syndrome. This syndrome is similar

to Turner Syndrome in that individuals with this syndrome will have only streak gonads. In contrast to Turner Syndrome, in which a chromosome is missing (XO), individuals with Swyer Syndrome have XY (male) chromosomes. Although Swyer Syndrome individuals have a Y chromosome, the chromosome may be missing the sex-determining segment. Without this segment, the embryo cannot develop testes and as a result, the masculinizing hormones are also missing. In the absence of the masculinizing hormones, the fetus will take the 'default' female path and will develop a uterus but will not have any ovaries.

"This condition is not apparent at birth and the child will be raised as a girl. The syndrome is generally diagnosed at puberty when the absence of a menstruation and breast enlargement causes suspicion.

"c. Internal Organ Anomalies – Persistent Mullerian Duct Syndrome

"Individuals with Persistent Mullerian Duct Syndrome have the internal organs typical of males as well as females. These individuals have a male chromosomal pattern (XY) and therefore develop testes which secrete androgen but for some reason fail to secrete anti-Mullerian hormones. The androgens cause the fetus to follow the male path and develop the external appearance and internal organs of a male. However, fallopian tubes and a uterus are also formed because the anti-Mullerian hormones are not acting to stop this development. This condition is generally not diagnosed at birth. Individuals with this syndrome are reared as males and have a male identity.

"d. External Organ Anomalies: Hermaphroditism

"Individuals who have ambiguous external genitalia (neither clearly male nor female) are commonly referred to as hermaphrodites. Hermaphrodites are often classified into three categories: true hermaphrodites, male pseudo-hermaphrodites, and female pseudo-hermaphrodites. A 'true hermaphrodite' has some ovarian and some testicular tissue. So-called 'true hermaphrodites' have either one ovary and one testis, two ovotestes (a combination of an ovary and testis in a single gonad) or some combination thereof (*e.g.* one ovotestes and one ovary). True hermaphroditic conditions are more rare than many of the other intersex conditions described in this section. A male pseudo-hermaphrodite has testes and no ovaries but some aspect of female genitalia. A female pseudo-hermaphrodite has ovaries and no testes and some aspect of male genitalia.

"A variety of disorders can lead to hermaphroditic conditions. Hermaphroditic conditions are named according to their etiology (*e.g.* Partial Androgen Insensitivity Syndrome ['PAIS'] or Congenital Adrenal Hyperplasia ['CAH']) unless the etiology of the condition remains unknown.

"True hermaphroditism is rare and the exact incidence is unknown. The chromosome count may vary but is predominantly 46XX.

"e. Hormonal Disorders

"*Androgen Insensitivity Syndrome*

"Androgen Insensitivity Syndrome ('AIS') affects approximately 1 out of every 20,000 genetic males. AIS can

be either complete ("CAIS") or partial (PAIS). Individuals with AIS are born with XY chromosomes and normally-functioning testes, which would otherwise suggest a normal male fetus. Individuals with CAIS, however, have a receptor defect and are unable to process the androgens produced by the testes.

"Because the body cannot process the androgens, the fetus will follow the default path of female development. External female genitalia will form. No internal reproductive organs will form because the Mullerian inhibiting factor produced by the testes will inhibit the growth of the uterus and fallopian tubes. The vagina will be shorter than in the typical woman (or may only be a dimple) and will end blindly because there are no female internal reproductive organs with which to connect.

"Unlike several other intersex conditions, individuals with CAIS almost always are identified as 'normal' females at birth because externally they are indistinguishable from XX females. The disorder is sometimes diagnosed in infancy because of inguinal hernias that contain the testes. Often, however, CAIS is not diagnosed until after the onset of puberty as a result of a failure to menstruate. At puberty, breasts will form because of the estrogen that is produced by the testes. Until puberty, many CAIS women have no inkling that they are other than normal XX women.

"In PAIS, an XY individual with testes will be partially receptive to androgens. Unlike individuals with CAIS, individuals with PAIS may fall anywhere along a spectrum from an almost completely male external appearance and male sexual identity to a completely female external appearance and female sexual identity. The

degree to which the individual has male features depends upon the degree to which the receptors are able to process the male hormones the testes produce.

"The external phenotype of PAIS individuals will initially be determined by the degree of androgen reception in the body. Thus, a PAIS individual may have genitalia resembling either a clitoris or a penis, the labia may be fused, and during adolescence there may be breast development due to the conversion of testosterone produced by the gonads to estradiol, an estrogen compound.

"*5-Alpha-Reductase Deficiency*

"This condition is similar to the androgen resistance syndromes. Individuals with 5-Alpha-Reductase Deficiency have XY chromosomes and testes but appear phenotypically female at birth. This condition results from the body's failure to convert testosterone to dihydrotestosterone, the more powerful form of androgen responsible for the development of male external genitalia. Despite a female appearance during childhood, by the onset of puberty, the body will masculinize. The testes descend, the voice deepens, muscle mass substantially increases, and a 'functional' penis that is capable of ejaculating develops from what was thought to be the clitoris. The prostate, however, remains small and beard growth is scanty. Although the individual is typically raised as a girl, at puberty, psychosexual orientation typically becomes male. In other words, virilization will occur at puberty in the absence of medical intervention.

"5-Alpha-Reductase Deficiency is an inheritable condition, and has resulted in a large group of

affected individuals in some communities in the Dominican Republic. In some cases, a diagnosis is made in early puberty, male external development is arrested, and the individual will take exogenous female hormones to simulate a female puberty. In these cases, the individual will often have a female sexual identity. Other individuals with 5 Alpha Reductase Deficiency will develop a masculine appearance in conformity with their genotype and will also develop a male psychosexual identification.

"*Congenital Adrenal Hyperplasia*

"Some individuals with XX chromosomes, ovaries, and other female internal structures have a more masculinized external appearance and/or demeanor due to an abundance of androgen production in-utero. Typical of this category is 21 Hydroxylase Deficiency Congenital Adrenal Hyperplasia ('CAH'). It occurs in approximately one out of 5000 to 15,000 births.

"Both the chromosomes and gonads of CAH individuals are indistinguishable from unaffected females. The genitals, however, may be ambiguous and may more closely resemble male genitalia.

"Some CAH individuals have been identified as males at birth and are reared as boys despite the presence of XX chromosomes and ovaries. In other cases, the masculinization of prenatal life is interrupted at birth, and the child is surgically and hormonally treated and reared as a girl. These girls often have characteristics that are popularly stereotyped as masculine. In addition,

many CAH individuals identify themselves as lesbians.

"*Progestin-Induced Virilization*

"Similar to CAH is Progestin Induced Virilization ('PIV'), which results from an abundance of male hormones in an otherwise normal XX female. PIV is caused by exposure in-utero to progestin that has been taken by the mother during pregnancy. Like individuals with CAH, PIV women will frequently have clitoral hypertrophy. In all other respects, however, they have completely female gonads.

"f. Gender Identity Disorder

"Some individuals may be seemingly harmonious in all of the first six factors, but do not identify themselves with the sex associated with these factors. These individuals may be said to have gender dysphoria or gender identity disorder ('GID'). Often these individuals are called transsexuals. Science has yet to definitely isolate a biological common denominator that causes these individuals to feel transgendered. A recent study, however, has determined that a section of the brain area that is essential for sexual behavior is larger in men than in women and that the brain structure of genetically male transsexuals is more similar to female brains than to male brains. Some transgendered individuals choose to undergo hormonal treatment and/or surgery so that their bodies comport with their sexual identity while other transsexuals do not choose to undergo such treatment.

"Transsexualism is not necessarily related to sexual orientation. Some transsexuals identify themselves as gays or lesbians while others identify themselves as heterosexuals. In other words, a male-to-female transsexual who has undergone surgery to acquire female genitalia may still prefer to have sex with another female, and a female-to-male transsexual may still prefer to have sex with another male.

"g. Surgical Creation of an Intersexed Condition

"In addition to cases in which intersexed individuals may be assigned a sex that does not comport with their own sexual identity, some persons have had their sexual features altered either accidentally or purposefully. For instance, some individuals have had their penises removed at a young age because they were mistakenly identified as females and the penis was considered an oversized clitoris that required reduction. Although these cases are rare, they are illustrative of the complex nature of sexual identity.

"The most famous surgical alteration case involves a male whose penis was accidentally ablated when he was eight months old. The doctors recommended that his genitals be reconstructed to have a female appearance and that he be raised as a girl even though all other sexual factors were congruent and were male. The doctors also recommended that his 'history' as a male be hidden from him.

"This surgical alteration case made headlines in 1973. Because the doctors involved in the surgical alteration reported that the child and the

parents had successfully adapted to the sex/gender alteration, sociology, psychology, and women's study texts were rewritten to argue, 'This dramatic case . . . provides strong support . . . that conventional patterns of masculine and feminine behavior can be altered. It also casts doubt on the theory that major sex differences, psychological as well as anatomical, are immutably set by the genes at conception.'

"For more than twenty years, the scientific literature continued to report that the surgical alteration was successful and the child's sexual identity was female. This case made headlines again in 1997 when Milton Diamond and Keith Sigmundson reported in the Archives of Pediatric & Adolescent Medicine that the boy who was turned into a girl was now living as a man.

"According to the Diamond and Sigmundson report, John (a pseudonym) had always thought of himself as different from other girls. As a child, he preferred 'boy' type toys and preferred to mimic his father's rather than his mother's behavior. He also preferred to urinate in a standing position although he had no penis. Because of the cognitive dissonance, Joan (a pseudonym used by the authors to describe John while he lived a female life) often had thoughts of suicide.

"At twelve, Joan was put on an estrogen regimen. She rebelled against the regimen and often refused to take the medication. At fourteen, Joan confessed to a doctor that she had suspected that she was a boy since second grade. At that point, the doctors agreed with Joan that she should be remasculinized and become John once more. At age fourteen, Joan/John returned to living as a male. He received male hormone shots and a

mastectomy. He underwent surgery to reconstruct a phallus at ages fifteen and sixteen. John was eventually accepted as a boy by his peers. He is now married and helping to raise his wife's children.

"John was not born an intersexual. He became an intersexual when doctors removed his penis, constructed external female genitalia and administered female hormones. Despite this intervention, John always felt that he was not a female.

"In another recently reported similar case, a child's penis was severely damaged during a circumcision that was performed when the child was two months old. A decision was made to 'turn' the child into a girl. At seven months, surgery was performed to remove the remainder of the male genitalia and from that point on the child was raised as a girl. She was interviewed by a psychiatrist at ages sixteen and twenty-six. The results of these interviews indicate that she self identifies as a bi-sexual female whose recreational and occupational interests are more typically identified with males.

"The significance of these two reports is that they exemplify the difficulty law and medicine must confront in defining sex. At birth, these infants' sex factors were congruent and were male. After the original intervention, they were turned into intersexuals but were treated by society as if they were females. They had male chromosomes, ambiguous genitalia, and female gender assignment. As adults, one person self-identifies as a heterosexual male while the other self-identifies as a bi-sexual female.

> "These studies and other reports about intersexuals have forced the medical and psychiatric communities to question their long-held beliefs about sex and sexual identity. Just as current scientific studies have caused the scientific communities to question their beliefs about sex and sexual identity, the legal community must question its long-held assumptions about the legal definitions of sex, gender, male, and female." Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology,* 41 Ariz. L.Rev. 265, 278-92 (1992).

I-E Case Law

This is a case of first impression in Kansas. A discussion of case law on transsexualism from other jurisdictions, including another nation, may prove helpful.

The cases generally fall into three categories: cases dealing with the amendment of identification records, usually birth certificate name and/or sex changes; cases dealing with discrimination, most pointedly in the workplace; and cases dealing with marriage between a transsexual and a nontranssexual. An additional case which will be discussed deals with transsexuals and competition in sporting events. The analysis will follow the cases chronologically.

The first case in the United States to deal with transsexualism involved a petition for a change of sex on a birth certificate. In *Mtr. of Anonymous v. Weiner,* 50 Misc.2d 380, 270 N.Y.S.2d 319 (1966), a post-operative transsexual who had assumed the name and role of a female applied to the Bureau of Vital Statistics in the New York City Health Department for a new birth

certificate. The Bureau requested guidance from the Board of Health, who, in turn, called on a committee on public health of the New York Academy of Medicine to investigate the issue and make recommendations. The group called on to assist included gynecologists, endocrinologists, cytogeneticists, psychiatrists, and a lawyer.

The committee, after a detailed analysis and taking into account that at the time 10 states permitted such a change, concluded that male-to-female transsexuals are "still chromosomally males while ostensibly females." 50 Misc.2d at 382, 270 N.Y.S.2d 319. Further, it was concluded that "it is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaption." 50 Misc.2d at 382, 270 N.Y.S.2d 319. Therefore, the committee found that it was opposed to a change on birth certificates in transsexualism cases.

The transsexual's application in *Weiner* was denied. In a resolution passed by the Board of Health, it was stated that "'an individual born one sex cannot be changed for the reasons proposed by the request which was made to us. Sex can be changed where there is an error, of course, but not when there is a later attempt to change psychological orientation of the patient and including such surgery as goes with it.'" 50 Misc.2d at 383, 270 N.Y.S.2d 319.

In examining this issue, the New York appellate court looked at the New York City Health Code provisions. The code provided for a change in birth certificate only if the Commissioner of Public Health was satisfied that the evidence shows true facts and that an error was made at the time of preparing and filing of the certificate. 50

Misc.2d at 383, 270 N.Y.S.2d 319. The court found that based on the code provision, the Board did not act arbitrarily, capriciously, or in an otherwise illegal manner. The decision of the Board to deny the transsexual's request was affirmed. 50 Misc.2d at 385, 270 N.Y.S.2d 319. By upholding the Board, the court then, indirectly, adopted the Academy's position.

However, a civil court in New York, in 1968 and then again in 1970, granted an application for a change of name to a post-operative transsexual. *Matter of Anonymous,* 57 Misc.2d 813, 293 N.Y.S.2d 834 (1968); *Matter of Anonymous,* 64 Misc.2d 309, 314 N.Y.S.2d 668 (1970). In the 1968 case of *Anonymous,* a male-to-female transsexual petitioned the court to order the Bureau of Vital Statistics of the Department of Health of the City of New York to change his birth certificate to reflect a name and sex change. Based on New York law, the civil court lacked jurisdiction to change the sex on the birth certificate. 57 Misc.2d at 813-14, 293 N.Y.S.2d 834. Even so, the court still criticized the findings of the Academy.

The court noted that all male organs had been removed and that the petitioner could no longer have sex as a male. The court stated that where, with or without medical intervention, the psychological sex and the anatomical sex are "harmonized," then the social sex or gender of the individual should conform to the harmonized status of the individual, and if such conformity requires a change in statistical information, the changes should be made. 57 Misc.2d at 816, 293 N.Y.S.2d 834.

Later, in *Mtr. of Hartin v. Dir. of Bur. of Recs.,* 75 Misc.2d 229, 232, 347 N.Y.S.2d 515 (1973), the appellate court reaffirmed the decision in *Weiner.* We can conclude

that as of the filing date of *Hartin,* New York was stating that its birth records should reflect the sex of an individual as determined at birth.

The court in *Hartin* noted in the decision that the Board minutes revealed that the Board was of the opinion that "surgery for the transsexual is an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease, and that nonetheless, does not change the body cells governing sexuality." 75 Misc.2d at 232, 347 N.Y.S.2d 515. One of the Board members was quoted as saying: " 'I would think that it would be unsound, if, in fact, there were encouragement to the broader use of this means of resolving a person's unhappy mental state.' " 75 Misc.2d at 232, 347 N.Y.S.2d 515. See also *Anonymous v. Mellon,* 91 Misc.2d 375, 380, 398 N.Y.S.2d 99 (1977) (court again refused to grant a change of sex designation).

The next case, often cited, but perhaps colored by the fact that the parties lived together only 14 days of their 3 month marriage, is *Corbett v. Corbett,* 2 All E.R. 33 (1970), an English opinion dealing with transsexualism. One of the parties was a male-to-female transsexual and former female impersonator named April Ashley, who married Arthur Corbett. Arthur was a homosexual and transvestite "prone to all kinds of sexual fantasies and practices." 2 All. E.R. at 38. An English court in the probate, divorce, and admiralty division ruled that a marriage between a post-operative male-to-female transsexual and a male was void. 2 All. E.R. at 50.

After the surgery, the respondent had her passport changed to reflect a female name. The respondent also had

insurance papers changed to reflect her sex as female. An attempt to change the respondent's birth certificate failed.

In *Corbett,* some dispute existed as to whether the respondent was "intersexed," which was described then as a medical concept meaning "something between intermediate and indeterminate sex." 2 All E.R. at 43. The court rejected this notion, finding enough evidence to support the view that the respondent was born a male. 2 All E.R. at 43.

The court found that biological sex is determined at birth and cannot be changed by natural or surgical means. The respondent's operation, the court stated, cannot affect the true sex. The only cases where the term "change of sex" is appropriate, the court opined, is when there has been a mistake as to sex at birth that is subsequently revealed in a medical examination. 2 All E.R. at 47.

In dealing with the argument that it is illogical for the court to treat the respondent as a male while other paperwork may have been changed to say differently, the court declared: "Marriage is a relationship which depends on sex and not on gender." 2 All E.R. at 49. The court distinguished marriage from other social situations. 2 All E.R. at 49. Sex is clearly an essential determinant of the relationship in marriage, the court stated, as it is recognized as the union between a man and woman. The court established a three-part test in determining what is a person's sex for purposes of the law, stating:

> "Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must . . . be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance

> which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place(dots3)the chromosomal, gonadal, and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention." 2 All E.R. at 48.

The unusual facts and the lack of a relationship in *Corbett* make it of questionable precedential value here. We recognize that it may have been the first time a court addressed these issues in the context of marriage.

A change in thinking can perhaps be observed beginning in 1975 in *Darnell v. Lloyd,* 395 F.Supp. 1210 (D.Conn.1975). The petitioner, called a male at birth, had a sex change operation and later requested that the Commissioner of Health change the sex on his birth certificate from male to female. The Commissioner refused to make such a change. The transsexual sued to have the Commissioner ordered to make this change, and the Commissioner moved for summary judgment.

The court denied the motion for summary judgment, finding that the Commissioner of Health must show some substantial state interest in his policy of refusing to change a birth certificate to reflect *current* sexual status unless that was also the status at birth. 395 F.Supp. at 1214. The court found that this heightened level of scrutiny exists because the court felt that the fundamental right to marry could be implicated by the Commissioner's decision. 395 F.Supp. at 1214.

The court held that the Commissioner of Health had not met his burden of proof. 395 F.Supp. at 1214. It indicated that the exact anatomical condition of the petitioner at birth was unclear, as were all of the details of the operation and present circumstances. 395 F.Supp. at 1213.

The case of *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204, *cert. denied* 71 N.J. 345, 364 A.2d 1076 (1976), deserves greater attention, in our view, than *Corbett, Hartin,* or *Darnell.*

In *M.T.,* a husband and wife were divorcing, and the issue was support and maintenance. The husband argued that he should not have to pay support to his wife because she was a male, making the marriage void. The issue before the court, similar to that before this court, was whether the marriage of a post-operative male-to-female transsexual and a male was a lawful marriage between a man and a woman. The court found that it was a valid marriage. 140 N.J.Super. at 90, 355 A.2d 204.

In affirming the lower court's decision, the court noted the English court's previous decision in *Corbett.* 140 N.J.Super. at 85-86, 355 A.2d 204. The court rejected the reasoning of *Corbett,* though, finding that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." 140 N.J.Super. at 87, 355 A.2d 204. Since the court found that the wife's gender and genitalia were no longer "discordant" and had been harmonized by medical treatment, the court held that the wife was a female at the time of her marriage and that her husband, then, was obligated to support her. 140 N.J.Super. at 89-90, 355 A.2d 204.

The importance of the holding in *M.T.* is that it replaces the biological sex test with dual tests of anatomy and gender, where "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." 140 N.J.Super. at 87, 355 A.2d 204.

The *M.T.* court further stated:

> "In this case the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did so here. In so ruling we do no more than give legal effect to a *fait accompli,* based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality." 140 N.J.Super. at 89-90, 355 A.2d 204.

In *M.T.,* the husband was arguing that he did not owe any support because his wife was a man. However, in the record, it was stated that the wife had a sex reassignment operation after meeting the husband. Her husband paid for the operation. The husband later deserted the wife and

then tried to get out of paying support to someone he had been living with since 1964 and had been married to for over 2 years.

In 1977, the Oregon Supreme Court was faced with the issue of whether a birth certificate of a transsexual should be changed to reflect a different name and sex. *K. v. Health Division,* 277 Or. 371, 560 P.2d 1070 (1977). In *K.*, the court first looked to the statutes regarding birth certificate changes. The court found limited circumstances existed under the law for birth certificate amendments. The amendments, further, only dealt with name changes and only in the case of adoption or if a parent name changes. 277 Or. at 374-75, 560 P.2d 1070.

Despite the Court of Appeals finding that the birth certificate could be amended, the Oregon Supreme Court held that no such authority existed in Oregon to change the birth certificate to reflect a change in sex or name in this instance. 277 Or. at 374-76, 560 P.2d 1070. The court stated that "it has not been demonstrated, by legislative history or otherwise, that it would be 'at variance with the apparent policy' of either the legislature or the State Board of Health to deny the issuance of a 'new birth certificate' to a transsexual." 277 Or. at 375, 560 P.2d 1070. The court further stated:

> "In our opinion, it is at least equally, if not more reasonable, to assume that in enacting these statutes it was the intent of the legislature of Oregon that a 'birth certificate' is an historical record of the facts as they existed at the time of birth, subject to the specific exceptions provided by statute." 277 Or. at 375, 560 P.2d 1070.

In so finding, the Supreme Court declared that "it is not for this court to decide which view is preferable. On the contrary, we hold that this is a matter of public policy to be decided by the Oregon legislature." 277 Or. at 376, 560 P.2d 1070.

In *Richards v. U.S. Tennis Assn.*, 93 Misc.2d 713, 400 N.Y.S.2d 267 (1977), the New York appellate court rejected the United States Tennis Association requirement that in order to be eligible to participate in a tournament, the plaintiff had to pass a sex-chromatin test. Renee Richards is a male-to-female transsexual. The court held that the test requirement was grossly unfair, discriminatory, and inequitable, and violated Richards' rights under New York Human Rights Law. 93 Misc.2d at 721, 400 N.Y.S.2d 267.

However, the court stated that in Richards' case, it seemed clear that the Association instituted this test for the sole purpose of preventing Richards from playing in the tournament. 93 Misc.2d at 721, 400 N.Y.S.2d 267. The court did not strike down the test, as such, but did indicate that the chromosome test should not be the sole criterion upon which a sex determination is made. 93 Misc.2d at 722, 400 N.Y.S.2d 267.

In 1984, the United States Court of Appeals, Seventh Circuit, analyzed an issue concerning transsexualism and workplace discrimination. In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir.1984), *cert. denied* 471 U.S. 1017, 105 S.Ct. 2023, 85 L.Ed.2d 304 (1985), a post-operative male-to-female transsexual who was a pilot for Eastern Airlines was fired in 1981, shortly after sex reassignment surgery. The transsexual sued the airline, alleging that the employer violated Title VII by discharging her from her position as a pilot. A federal district court

agreed with the transsexual, finding discrimination against this person as both a female and a transsexual, and the airline appealed. 742 F.2d at 1082.

The Seventh Circuit disagreed with the district court. The court stated that while it does not condone discrimination in any form, it must hold that Title VII does not protect transsexuals. 742 F.2d at 1084. First, the court stated: "It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning." 742 F.2d at 1085. The court explained that the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder. It noted that the law clearly prohibits discrimination against women because they are women or men because they are men; it does not protect a person born with a male body who believes himself to be female or a person born with a female body who believes herself to be male. 742 F.2d at 1085.

After noting that nothing was said in the legislative history about transsexuals, the court stated that it appears clear that Congress did not intend the legislation to apply to anything other than "the traditional concept of sex." 742 F.2d at 1085. Had Congress intended it to apply, surely it would have said so, the court explained. 742 F.2d at 1085. Thus, the court declined to expand the definition of "sex" as used in Title VII beyond its "common and traditional interpretation," stating: "We agree with the Eighth and Ninth Circuits that if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress." 742 F.2d at 1087. See *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir.1982);

Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir.1977).

The two most recent decisions in the United States in the area of transsexualism have dealt with the precise issue before this court, that is, whether two individuals, biologically and legally of the same sex at birth, may contract to marry each other.

In 1987, a probate court in Ohio addressed the question in the case of *In re Ladrach,* 32 Ohio Misc.2d 6, 513 N.E.2d 828 (1987). In *Ladrach,* a post-operative male-to-female transsexual and the transsexual's fiance, a biological male, applied for a marriage license. The application indicated that the transsexual had been married two times before to spouses of the female gender and that both marriages had ended in divorce.

After reading the application, the clerk at the license bureau called a judge who reviewed the application. The judge also reviewed a signed letter by a physician indicating that the transsexual had undergone sex reassignment surgery. After reviewing the marriage statute in Ohio, the judge concluded that the application must be denied. Later, the transsexual also filed a petition to have the sex corrected on the transsexual's birth certificate to state "Girl" instead of "Boy." This application was dismissed, and the transsexual filed a complaint for declaratory judgment to have the birth certificate changed and the marriage license issued.

The Ohio Probate Court found that the birth certificate, based on Ohio law, should not be changed. The court stated that its statute is a "correction" type statute, which permits a court to correct errors such as spelling of names, dates, race and sex, if in fact there was an error. 32 Ohio

Misc.2d at 8, 513 N.E.2d 828. Since there was no error in the designation of the transsexual as a boy, the application, the court stated, must be dismissed as to the birth *certificate* change. 32 Ohio Misc.2d at 8, 513 N.E.2d 828.

The court concluded, after a review of prior case law, law review articles, and the posthearing brief of the applicant, that no authority existed in Ohio for the issuance of a marriage license to a post-operative male-to-female transsexual and a male person. 32 Ohio Misc.2d at 10, 513 N.E.2d 828. If it is to be the public policy of the state of Ohio to issue marriage license in such cases, the court stated, "it is this court's opinion that the legislature should change the statutes." 32 Ohio Misc.2d at 10, 513 N.E.2d 828.

The most recent decision in the United States regarding transsexualism was decided by the Texas Court of Appeals in *Littleton v. Prange,* 9 S.W.3d 223 (Tex.Civ. App. 1999), *cert. denied* 531 U.S. 872, 121 S.Ct. 174, 148 L.Ed.2d 119 (2000). In J'Noel's case, the district court appears to rely heavily on this case in rendering its decision that J'Noel is a male, quoting some of its language verbatim. In *Littleton,* a transsexual, now called Christie, who was born a man but had undergone sex reassignment surgery, brought a medical malpractice suit under Texas' wrongful death statute as a surviving spouse of a male patient. The doctor who was sued filed a motion for summary judgment, asserting that Christie was a male and, therefore, could not be the surviving spouse of another man. The trial court granted summary judgment to the doctor, and Christie appealed.

Christie had a name and sex change made on her birth certificate during pendency of the suit. During the

surgical procedures, Christie's penis, scrotum, and testicles were removed, and a vagina and labia were constructed. Christie also had breast construction surgery. One of Christie's doctors testified that Christie "has the capacity to function sexually as a female" after the surgery. 9 S.W.3d at 225. Doctors testified that medically Christie was a woman.

Christie married a man by the name of Jonathon in 1989, approximately 9 or 10 years after sex reassignment surgery. The two lived together until Jonathon's death in 1996, after which time Christie filed suit against Jonathon's doctor. In Christie's affidavit, Christie asserted that Jonathon knew about Christie's background and sex reassignment surgery.

The court in *Littleton* stated that in Texas, marriage must be between two parties of the opposite sex. 9 S.W.3d at 225. Further, in order for Christie to sue under the wrongful death statute in Texas, Christie must be the surviving spouse. 9 S.W.3d at 225. Thus, if Christie was a man, summary judgment would be appropriate. After a brief review of what transsexualism is, the court next examined the case law in this area. The court discussed *Corbett* and the case of *Anonymous v. Anonymous,* 67 Misc.2d 982, 325 N.Y.S.2d 499 (1971). The court also referenced such cases as *M.T. v. J.T., In re Ladrach,* and *K. v. Health Division.* 9 S.W.3d at 227-29.

After a review of the case law, the court concluded that Christie was a male as a matter of law. 9 S.W.3d at 231. The court noted that this was an issue of first impression in Texas. 9 S.W.3d at 230. In line with previous cases, the court stated: "[I]t is for the legislature, should it choose to do so, to determine what guidelines should govern the

recognition of marriages involving transsexuals. . . . It would be intellectually impossible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex." 9 S.W.3d at 230.

While Christie argued that amputation was "'a pretty important step,'" the court, while agreeing, explained that it had "no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature." 9 S.W.3d at 230.

Thus, the court found that even though surgery and hormones can make a transsexual male look like a woman, including female genitalia, and in Christie's case, even breasts, transsexual medicine does not create the internal sex organs of a woman (except for a man-made vaginal canal). There is no womb, cervix, or ovaries in the post-operative transsexual female. The chromosomes do not change. Biologically, the post-operative female is still a male. 9 S.W.3d at 230. Even though some doctors would consider Christie a female and some a male, the court concluded: "Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied." 9 S.W.3d at 231.

The dissent in *Littleton* concluded that the matter could not be decided as a matter of law, that there were genuine issues of material fact, and that therefore an affirmance of summary judgment was precluded. The dissent noted that no law defined how a person's "gender" is to be determined and that since the legislature had not addressed whether a transsexual may be considered a surviving spouse under Texas law, the appellate court

could not conclude that judgment should be affirmed as a matter of law. 9 S.W.3d at 232-33 (Lopez, J., dissenting).

A petition for writ of certiorari of the *Littleton* holding was denied by the United States Supreme Court on October 2, 2000.

I-F Other Laws, Cases, Regulations and Considerations

Kansas law allows individuals to change the sex designation on their birth certificates "with a medical certificate substantiating that a physiological or anatomical change occurred." K.A.R. 28-17-20(b)(1)(A)(i).

K.S.A.2000 Supp. 65-2416(a) states that a birth certificate is "prima facie evidence of the facts therein stated."

Kansas does not require proof of one's sex to obtain a marriage license. K.S.A.2000 Supp. 23-106.

The Kansas Supreme Court has stated that the "'[p]ublic policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together and to prevent separation.'" *Ranney v. Ranney,* 219 Kan. 428, 431, 548 P.2d 734 (1976).

Transsexual issues have or will arise in situations involving penal institutions, schools, sports, employment, and every other situation in which perceived gender is important.

I-G Summary Judgment

J'Noel argues that summary judgment, holding her marriage to Marshall invalid, was not appropriate because genuine issues of material fact exist as to whether she was a male or female at the time she obtained a marriage license and wed. In her motion for partial summary judgment, J'Noel stated that the issue the district court should decide was whether she was legally a female and was a female at the time of the marriage to Marshall. This was also stated by J'Noel's counsel during oral arguments on the motions. Later at the hearing, however, J'Noel's counsel stated that the court was not being asked to determine if J'Noel was male or female but was being asked to give full faith and credit to the order amending her birth certificate. J'Noel contended the birth certificate was dispositive.

The standard of review for a motion for summary judgment has been well established. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. K.S.A.2000 Supp. 60-256(c).

The district court found that J'Noel was a male at the time she obtained her license and married, for purposes of K.S.A.2000 Supp. 23-101. There is no dispute between the parties that J'Noel was born a male with male genitalia, that J'Noel's original birth certificate stated that J'Noel was a male, or that J'Noel suffers from gender dysphoria, which is characterized by a strong desire to be the opposite sex. The question really is whether J'Noel was a male or a female, for the purpose of the statute, at the time the

marriage license was issued. Inherent in that question is the question of what criteria are to be used to determine the sex of an applicant at the time of the application process. Both parties agree that J'Noel's original birth certificate has been amended to state that J'Noel is a female.

The district court was provided with J'Noel's deposition and affidavits that give opinions as to whether what J'Noel has undergone indeed transformed J'Noel into a female. The affidavits are material, and they contradict each other. The district court was required to interpret K.S.A.2000 Supp. 23-101 as to what the legislature intended when it is stated that marriage must be between two parties "who are of opposite sex." The court had to decide whether the legislature intended a marriage between a post-operative male-to-female transsexual and a male to be valid for purposes of the statute.

II-FULL FAITH AND CREDIT

J'Noel continues to argue that the district court erred by failing to give full faith and credit to J'Noel's Wisconsin birth certificate that designates J'Noel as female. This is a question of law over which appellate review is unlimited. See *Rose & Nelson v. Frank,* 25 Kan.App.2d 22, 24, 956 P.2d 729, *rev. denied* 265 Kan. 886 (1998).

Article IV, § 1, of the United States Constitution states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner

> in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

"The general rule is that a judgment rendered by a court of one state is entitled to recognition in the courts of another state to the same extent as it has by law or usage in the courts of the state where the judgment was rendered." *State v. Pope,* 23 Kan.App.2d 69, 80, 927 P.2d 503 (1996), *rev. denied* 261 Kan. 1088 (1997).

Joe argues that the report authorizing J'Noel's birth certificate change was not a judgment. He argues that it was not a document generated by a court but merely an administrative form provided by the state registrar.

In order to change her birth certificate, J'Noel followed Wisconsin statute § 69.15(4)(b), which provides:

> "Any person with a direct and tangible interest in a birth certificate registered in this state may petition a court to change the name and sex of the registrant on the certificate due to a surgical sex-change procedure. If the state registrar receives an order which provides for such a change the state registrar shall change the name and sex on the original birth certificate, except that if the court orders the state registrar to prepare a new certificate the state registrar shall prepare a new certificate under sub.(6)."

Joe is correct that an entry made by a court clerk without direction cannot constitute an entry of judgment because the rendition of judgments is a judicial function to be performed by judges and not by clerks. See *In re Estate of Penn,* 216 Kan. 153, 157-58, 531 P.2d 133 (1975). In this case, however, the order to change the name and sex on J'Noel's birth certificate is signed by a judge. Although it

also contains a place for the clerk of the court to sign, the name actually signed is "Michael Gage." It has his printed name and designation as "judge." Thus, this particular order appears to be a judgment.

Even if it were not, the Full Faith and Credit Clause of the Constitution still requires full faith and credit to be given to records of other states. United States Constitution, Article IV, § 1. Absent an overriding consideration, the certificate itself is entitled to full faith and credit.

One such overriding consideration could be violation of Kansas public policy. J'Noel argues that Kansas public policy not only is *not violated* by granting full faith and credit to the Wisconsin birth certificate but that it *supports* such an approach. Her authority is a Kansas regulation, promulgated by the Department of Health and Environment, that allows for a change of sex designation on a birth certificate, including when an anatomical change has occurred.

The regulation, K.A.R. 28-17-20(b)(1)(A)(i), states that a birth certificate may be amended after 90 days for certain limited reasons, including if "the registrant's sex . . . was incorrectly recorded or . . . a physiological or anatomical change occurred." Proof is necessary in the form of the applicant's affidavit in the first instance and a medical certificate in the second instance. K.A.R. 28-17-20(b)(1)(A)(i).

K.A.R. 28-17-20 is authorized by K.S.A. 65-2402 and implements K.S.A.2000 Supp. 65-2422c. K.S.A.2000 Supp. 65-2422c deals with corrections to birth certificates or records. K.S.A.2000 Supp. 65-2422c states in part: "The secretary [of health and environment] may by regulation prescribe procedures for making *minor corrections* to

certificates or records. Any certificate so corrected shall be marked 'amended,' and shall have such further markings as shall be prescribed by the secretary." (Emphasis added.)

To correct, generally, means to make right what is wrong. Black's Law Dictionary 347 (7th ed.1999). This court could find that giving ordinary meaning to the term "correct," the Department of Health and Environment exceeded its statutory authority in promulgating K.A.R. 28-17-20(b)(1)(A)(i) as it relates to amendments of sex designations in response to anatomical changes. An administrative agency may not, under the guise of a regulation or order, substitute its judgment for that of the legislature. It may not alter, modify, or enlarge the legislative act which is being administered. *In re Tax Appeal of Newton Country Club Co.,* 12 Kan.App.2d 638, 647, 753 P.2d 304, *rev. denied* 243 Kan. 779 (1988).

Here, it appears likely that, to the extent the regulation appears to allow for the change of a sex designation on a Kansas birth certificate to respond to anatomical changes, it oversteps. It is highly unlikely a fundamental change of that nature was contemplated by the legislature when it passed K.S.A.2000 Supp. 65-2422c on "minor corrections."

We note that the Texas Court of Appeals was faced with the issue of the effect of an amended birth certificate in *Littleton,* 9 S.W.3d at 231. As stated, Christie applied for and received an amended birth certificate during the pendency of that case. A Texas trial court ordered the change of sex and name on Christie's birth certificate. The Court of Appeals found that the court was not bound by this amended certificate, stating that the trial court's role in considering the petition was a ministerial one and that

deeper public policy concerns were not addressed. 9 S.W.3d at 231.

Further, the Texas statute allowing for birth certificate changes allowed amendments if the record was "'incomplete or proved by satisfactory evidence to be inaccurate.'" 9 S.W.3d at 231. While the trial court applied the term "'inaccurate'" to the present, the Court of Appeals found that the legislature meant the term to mean at the time of birth. 9 S.W.3d at 231. Because Christie was a male at the time of birth, both anatomically and genetically, the facts in the original birth certificate were accurate and no change should have been made. 9 S.W.3d at 231.

Regardless, J'Noel's effort to rely on K.A.R. 28-17-20 to determine Kansas public policy in this case fails. The legislature sets public policy, not administrative agencies. We read the Kansas regulation as neutral, favoring neither J'Noel's nor Joe's positions on the effect of the Wisconsin birth certificate.

The intended function of the Full Faith and Credit Clause was to avoid relitigation in other states of adjudicated issues, while leaving to the law of the forum state the treatment and effect of the predetermined facts in a new situation. *Sutton v. Leib,* 342 U.S. 402, 407, 72 S.Ct. 398, 96 L.Ed. 448, *reh. denied* 343 U.S. 921, 72 S.Ct. 674, 96 L.Ed. 1334 (1952). Because neither the State of Kansas nor Joe was a party to the judgment of the Wisconsin court altering J'Noel's birth certificate, it may be argued that such a judgment is not binding on either the State of Kansas or Joe. See *Riley v. New York Trust Co.,* 315 U.S. 343, 349-50, 62 S.Ct. 608, 86 L.Ed. 885, *reh. denied* 315 U.S. 829, 62 S.Ct. 903, 86 L.Ed. 1223 (1942) (finding that a

Delaware court was free to determine domicile anew for a party who was not bound by a previous Georgia judgment relating to domicile because he was not in privity with any parties before the Georgia court). We do not find it necessary to go to that extreme, however, to affirm the district court's treatment of the certificate as nondispositive on the issue of J'Noel's sex at the time she obtained her Kansas marriage license.

Even if it is assumed that J'Noel's amended birth certificate must be given full faith and credit in Kansas, it is a well-established rule of law that Kansas must give the amended certificate only as much recognition or weight as would Wisconsin, the state in which it was issued. No greater effect need be given to any judgment of a court of one state than that given in the state where it was rendered. *Keller v. Guernsey,* 227 Kan. 480, 482, 608 P.2d 896 (1980).

Wis. Stat. § 69.21 (2000) deals with the evidentiary weight placed on vital statistic records. Wis. Stat. § 69.21(1)(c) states:

> "Any certified copy of a vital record or part of a vital record issued under this subsection shall be deemed the same as the original vital record and shall be prima facie evidence of any fact stated in the vital record, except that the evidentiary value of a vital record filed more than one year after the event which is the subject of the vital record occurred or of a vital record which has been amended shall be determined by the judicial or administrative agency or official before whom the vital record is offered as evidence."

Clearly, J'Noel's original birth certificate has been amended. Both the original and amended birth certificates

were before the district court. The court, based on Wisconsin law, was allowed to determine the weight of the evidence offered in the form of the birth certificate. Wis. Stat. § 69.21(1)(c). The court in Kansas appeared to give the birth certificate little or no weight, which was its option. This was not error.

III-EQUAL PROTECTION

J'Noel argues that the district court's decision violates the Equal Protection Clause of the 14th Amendment of the United States Constitution by not recognizing J'Noel's legal status as female and denying J'Noel the right to marry.

A new legal theory may not be asserted for the first time on appeal or raised in a reply brief. *Jarboe v. Board of Sedgwick County Comm'rs,* 262 Kan. 615, 622, 938 P.2d 1293 (1997). J'Noel did not note this in her response to Joe's objection to her petition for issuance of letters, her suggestions in opposition to Joe's motion for summary judgment, her motion for partial summary judgment, or at oral argument on the motions.

J'Noel argues that she could not have raised this issue at the district court level because the district court had not yet ruled on the issue of the validity of J'Noel and Marshall's marriage. J'Noel argues that she is not arguing that K.S.A.2000 Supp. 23-101 is unconstitutional on its face but as applied to her marriage.

J'Noel's argument concerning equal protection fails. The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

When J'Noel was found by the district court to be a male for purposes of Kansas law, she was denied the right to marry a male. It logically follows, therefore, that the court did not forbid J'Noel from marrying a female. Federal law allows a state to not give effect to another state's recognition of a same-sex marriage. 28 U.S.C. § 1738C (1996). Kansas law forbids same-sex marriages. K.S.A.2000 Supp. 23-101.

IV. FRAUD AND WAIVER

Joe argues that the district court's decision could be affirmed on the grounds of fraud and waiver. Joe's motion for summary judgment, filed with the district court, included both of these grounds. The trial court did not rule on the fraud issue, but it clearly denied Joe's motion with respect to waiver.

> "A denial of a motion for summary judgment may be reviewed on appeal when asserted as a cross-appeal. See K.S.A. 60-2103(h). It is, of course, necessary that a cross-appeal be perfected in order to obtain appellate review of the adverse decision. [Citation omitted.] If no cross-appeal is filed, the trial court's undisturbed rulings would become a final decision when the case is finally adjudicated." *Grimmett v. S & W Auto Sales Co.*, 26 Kan.App.2d 482, 484, 988 P.2d 755 (1999).

Joe did not file a cross-appeal. Therefore, the court's ruling denying Joe's summary judgment motion on the issue of waiver is not before us, and it becomes the law of the case. See *Vaughn v. Murray*, 214 Kan. 456, Syl. ¶ 5, 521 P.2d 262 (1974).

With respect to the issue of fraud, summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. K.S.A.2000 Supp. 60-256(c).

Joe argues that J'Noel induced Marshall into marriage because she assured Marshall several times that she was not marrying him for his money. Genuine issues of material fact exist as to the fraud issue, and that issue may be considered on remand.

CONCLUSION

This court rejects the reasoning of the majority in the *Littleton* case as a rigid and simplistic approach to issues that are far more complex than addressed in that opinion.

We conclude that a trial court must consider and decide whether an individual was male or female at the time the individual's marriage license was issued and the individual was married, not simply what the individual's chromosomes were or were not at the moment of birth.

The court may use chromosome makeup as one factor, but not the exclusive factor, in arriving at a decision.

Aside from chromosomes, we adopt the criteria set forth by Professor Greenberg. On remand, the trial court is directed to consider factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity. The listed criteria we adopt as significant in resolving the

case before us should not preclude the consideration of other criteria as science advances.

In many of the cases cited, there was very little history of a relationship, if any existed at all. Here, the history of the relationship appears stable and compatible.

If fraud be shown, a marriage can always be annulled, under any circumstances. While we find no badges of fraud in the record before us, it remains a potential alternative basis to void the marriage. Here, the evidence in the appellate record to date points to a conclusion that Marshall knew of the transsexual nature of J'Noel, approved, married, and enjoyed a consummated marriage relationship with her.

Affidavits of physicians are but one piece of evidence to be considered when reaching a conclusion.

This court looks with favor on the reasoning and the language of *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204, *cert. denied* 71 N.J. 345, 364 A.2d 1076 (1976).

Last, we note the conclusion of William Reiner, M.D., a researcher at The Johns Hopkins Hospital:

> "In the end it is only the children themselves who can and must identify who and what they are. It is for us as clinicians and researchers to listen and to learn. Clinical decisions must ultimately be based not on anatomical predictions, nor on the 'correctness' of sexual function, for this is neither a question of morality nor of social consequence, but on that path most appropriate to the likeliest psychosexual developmental pattern of the child. In other words, the organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the

brain." Reiner, *To Be Male or Female – That is the Question,* 151 Arch Pediatr. Adolesc. Med. 225 (1997).

This matter is reversed and remanded for a full hearing, with the opportunity for each side to present evidence on at least the factors enumerated in the Greenberg article and with directions to consider the conclusions of this court and the legal and scientific research we rely upon.

IN THE DISTRICT COURT OF
LEAVENWORTH COUNTY, KANSAS
PROBATE DIVISION

In the matter of the Estate of Marshall G. Gardiner,	)	Case No. 9908 PE 00119
Deceased.	)	(Filed Feb. 16, 2000)

JOURNAL ENTRY GRANTING JOSEPH M. GARDINER SUMMARY JUDGMENT

NOW on this 21st day of January, 2000, the cross-motions for Summary Judgment filed by petitioner Joseph M. Gardiner, III and respondent J'Noel Gardiner concerning J'Noel Gardiner's status as the alleged surviving spouse and heir at law of Marshall G. Gardiner, deceased, come on regularly for hearing. Joseph M. Gardiner, III appears in person and through counsel, John F. Thompson of Davis, Beall, McGuire & Thompson and David G. Watkins and William M. Modrcin of Morrison & Hecker, L.L.P. Respondent appears through counsel, Sanford P. Krigel and Christine M. Donnelly of Krigel & Krigel, P.C. Leonard L. Buddenbohm, administrator for the Estate, appears in person. There are no other appearances.

The Court, having reviewed the memoranda filed by the parties, having heard the arguments and statements of counsel and being well and fully advised in the premises, finds that the motion of Joseph M. Gardiner, III regarding the validity of the marriage should be granted and the motion of J'Noel Gardiner regarding full faith and credit should be denied.

The Court finds that J'Noel Gardiner was born a male and remains a male for purposes of marriage under

Kansas law; that the marriage between Marshall G. Gardiner and J'Noel Gardiner is void under K.S.A. 23-101; that J'Noel Gardiner is not Marshall G. Gardiner's surviving spouse under Kansas law; that J'Noel Gardiner is not entitled to receive a spousal share under the laws of intestate succession nor does J'Noel Gardiner have any other rights or interest in the Estate of Marshall G. Gardiner, deceased. The Court further incorporates by reference into his Journal Entry its other findings of fact and conclusions of law announced from the bench during the course of this hearing. Accordingly, the Motion for Summary Judgment filed by Joseph M. Gardiner, III regarding the validity of the marriage is granted and the Motion for Partial Summary Judgment filed by J'Noel Gardiner is denied.

IT IS SO ORDERED.

2/16/00
Date

/s/ Gunnar A. Sundby
Judge Gunnar A. Sundby

[SEAL]

STATE OF KANSAS)
LEAVENWORTH COUNTY) SS

I hereby certify that the foregoing is a true copy of the record on file in this court and cause.

/s/ Rosa M. Kulan Clerk
Dated 2/16/00

Approved by:

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ATTORNEYS FOR J'NOEL GARDINER

IN THE DISTRICT COURT OF
LEAVENWORTH COUNTY, KANSAS

IN RE:	)	Estate No. 9908 PE 00119
THE ESTATE OF MARSHALL GARDINER	)	(Filed Mar. 8, 2000)

FINDINGS AND RULINGS OF THE COURT,

taken on Friday, the 21st day of January, 2000, between the hours of 8:00 o'clock in the forenoon and 6:00 o'clock in the afternoon of that day at the Leavenworth County Courthouse, 300 Walnut, in the City of Leavenworth, County of Leavenworth, State of Kansas, before the Honorable Judge Gunnar A. Sundby, electronically tape recorded and later transcribed by:

AMANDA LOWE, CSR, RPR
Certified Shorthand Reporter
Registered Professional Reporter

a Certified Shorthand Reporter within and for the State of Kansas.

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MS. CHRISTINE M. DONNELLY

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EXHIBITS

NONE MARKED

[3] THE COURT: Well, first of all, I guess I'd say by ruling today I am not trying to create statewide attention to this issue, or trying to require the State to review its current laws or create new laws. All I'm trying to do is dispose of what can be disposed on these motions for summary judgment between the parties.

The – Mr. Joe Gardiner has raised the issue of waiver by the – by J'Noel, stating that she has waived her interest in his estate and therefore should not be able to pursue claims in this court. I'm going to deny summary judgment on that count.

There was an argument that 59-6(a) 213 doesn't apply, but I think it does apply to cases of intestacy, I think it

still applies even though it's captioned, or codified, under the area of – under the section referred to as wills, I still think it does apply.

The document, which is Exhibit C, I believe, let me make sure. Yeah, its Exhibit C – can constitute a waiver if you look at 59-6(a) 213 it says under paragraph D, and waiver of, quote, all right, and I'm abbreviating, in the property of a prospective spouse, is a waiver [4] of all rights of elective share, homestead and family allowance by each spouse in the property of the other, and a renunciation by each of all benefits that would otherwise pass to such spouse from the other by intestate succession. Then, it goes on.

And when you read the document C, which the Court finds factually that she signed and executed it – or signed it back in September of 1998, says that she do now – and that's using her language – do now and forever waive any property interests, it goes on, concerning Mr. Marshall Gardiner that may otherwise come to me by action of law without his expressed intent.

That could constitute a waiver. However, she has filed, or she somewhat disputes the reasonings behind the signing of that document, and so there is a mild dispute. A fair reading of the four corners doesn't give much argument to that, but she has raised the issue.

Also if you review the statute, though, there is the issue that, well, it could be non-enforceable. If she did not execute it voluntarily, which I think we're beyond that hurdle. I think she created it, it would be hard [5] to argue that it wasn't her voluntary signature, but the other option is that it is unconscionable, and plus, that it was not with good information, shall we say, to abbreviate,

Without a fair and reasonable disclosure of property, without a waiver of disclosure of that information or without reasonable access to that information. There's been some dispute as to that by J'Noel. She has indicated she wasn't clear as to what his extent is. The Court can't find, factually, that waiving a right to one half of two and a half million dollars is unconscionable or not unconscionable, so therefore, I think those facts are sufficiently in dispute that I can not rule that Exhibit C is a waiver.

As to Exhibit B, that's also factually disputed, and in review of the document, the Court can't find from the four corners of it, or from the exhibit submitted to the Court that it is undisputed to constitute a waiver, and so therefore the Court will deny summary judgment as to Exhibit B.

As to estoppel, the facts are that she married him for his love, but there's no – that [6] I could find, any true statements that she expressly waives her right to his estate, and I believe that either under the common law or under estoppel, she would have to say not only am I marrying him for love, but I'm giving up every right to his estate in the future, whatever that may be.

While the waiver is perhaps sufficient under 59-6(a) 213, I think if you're going to rely on common law or estoppel, you have to show that, first of all, the law is in disfavor of giving up your right to an estate. The law looks in disfavor of that. There is some dispute over that, the true intent of saying that I'm marrying for love, I don't think, in essence, creates clear evidence that she should be estopped from asserting her claims or that under the common law she's waived all interests in his estate.

As to summary judgment on the issue of marriage, I am going to grant Joe Gardiner's motion for summary judgment. First of all, I appreciate all the fine materials that the attorneys have presented and they've argued very carefully to this Court. I appreciate the vast sources of information and the documents, because [7] it's been all very helpful, and that's also to say the issue of sexual identity is an issue that needs compassion and not ridicule or argument.

I mean, I am sympathetic to some of the issues that J'Noel has gone through and I appreciate the people that are out there working and assisting her to accomplish the problem that she's experienced, or an issue that she's experienced, but as, you know, reading from – and I'm using the Littleton case and, I guess, using their language. And looking through the documents that were submitted to the Court and the law submitted to the Court as pointed out, I'm going to use a lot of their language verbatim.

Medical science recognizes that there are individuals whose sexual self-identity is in conflict with their biological and anatomical sex. Such people are termed transsexuals. That's been contained within the material submitted to this Court.

Two, a transsexual is not a homosexual in the traditional sense of the word, in that transsexuals believe and feel they are members of the opposite sex. Nor is a transsexual a [8] transvestite. That, again, is contained in the materials submitted to the Court. Based upon that, J'Noel is a transsexual.

Number four, through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts. Transsexual

medical treatment, however, does not create the internal sexual organs of a woman, except for the vaginal canal. There is no womb, cervix or ovaries in the post-operative transsexual female.

Number five, the male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically, a post-operative female transsexual is still a male. That's also in the materials submitted.

The evidence fully supports that J'Noel, born male, wants and believes herself to be a woman. She has made every conceivable effort to make herself a female.

Number seven, some physicians would consider J'Noel a female; other physicians would consider her still a male. Her female anatomy, however, is still all man-made. The body that J'Noel inhabits is a male body in all aspects [9] other than what the physicians have supplied.

From that the Court has to conclude, and from the evidence that's been submitted under the affidavits, as a matter of law, she – J'Noel is a male.

The argument against that has been that the Court should give full faith and credit to Wisconsin, where they have allowed a new birth certificate to be created as a result of the surgery and procedures that J'Noel has undergone, but the Court would find that that is not – all the Court would do, if I gave full faith and credit, all I would do is give full faith and credit to the fact that they authorized – the Court authorized a change in her birth certificate.

It is not that a Court, after a hearing, found her to be a woman. Or a female, should I say, or – so therefore, the

Court, if it gave full faith and credit, it would have no impact on the findings of the Court today.

Furthermore, it is just an administrative ruling made to correct a document or to change a document, and therefore, the Court questions whether full faith and credit needs to [10] be given to those type of administerial acts.

So the Court finds that the argument that full faith and credit should be given, and if given should cause this Court to make the finding that she is a female, is not binding on this Court, and so the Court rejects that argument.

So the Court will find that she is a male for these proceedings, and that impacts, then, on her ability to file a claim against this estate. That's all.

[11] CERTIFICATE

I, AMANDA LOWE, Certified Shorthand Reporter within and for the state of Kansas, hereby certify that the foregoing is a correct and complete transcript of the proceedings of January 21st, 2000 heard in the Estate of Marshall G. Gardiner, Case No. 9908 PE 00119 recorded by electronic tape, tape numbers 1-379 and 1-380, had in this matter at the aforementioned time and place.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of March, 2000.

/s/ Amanda Lowe
AMANDA LOWE, CSR
Certified Shorthand Reporter

STATE OF WISCONSIN
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF HEALTH

ORIGINAL CERTIFICATE OF LIVE BIRTH

STATE FILING DATE
STATE BIRTH NO.

148— December 10, 1957
57-95000864

LOCAL FILE NUMBER 980-5

CHILD—NAME First	Middle	Last	DATE OF BIRTH Month Day Year	HOUR
1. J'NOEL	BALL		2a. November 4, 1957	2b. 5:25PM

SEX	THIS BIRTH, Single, Twin, Triplet, Etc.	IF NOT SINGLE BIRTH Born First, Second, Etc. (Specify)	COUNTY OF BIRTH
3. ☐ Male ☒ Female	4a. SINGLE (Specify)	4b.	5a. BROWN

NAME OF CITY OR VILLAGE (If Neither, Name Township)	Inside City or Village Limits	HOSPITAL—NAME (If Not in Hospital, Give Street and Number or Location)
5b. GREEN BAY	5c. ☒ Yes ☐ No	5d. BELLIN MEMORIAL HOSPITAL

MOTHER—MAIDEN NAME First	Middle	Last	AGE	STATE OF BIRTH (If not in U.S.A., Name of Country)
6a. ANNA	MERLE	MORGAN	6b. 22	6c. MISSISSIPPI

RESIDENCE—STATE	COUNTY	NAME OF CITY, VILLAGE (If Neither, Name Township)	Inside City or Village Limits	MAILING ADDRESS
7a. WISCONSIN	7b. BROWN	7c. GREEN BAY	7d. ☒ Yes ☐ No	7e. 1622 CARROLL AVENUE

FATHER—NAME First	Middle	Last	AGE	STATE OF BIRTH (If not in U.S.A., Name of Country)
8a. JESSE	NOEL	BALL	8b. 28	8c. MISSISSIPPI

INFORMANT—SIGNATURE	RELATION TO CHILD
9a. ANNA BALL	9b. MOTHER

I Certify That The Above Named Child Was Born Alive at The Place and Time on The Date Stated Above	DATE SIGNED	ATTENDANT (Specify)
10a. Signature THOMAS J.DURKIN-MD	10b. Nov. 6, 1957	☒ M.D. ☐ Midwife ☐ D.O. ☐ Other

CERTIFIER—NAME Type or Print	MAILING ADDRESS Street or R.F.D. No. City or Village State Zip
10d. THOMAS J.DURKIN-MD	10e. GREEN BAY, WISCONSIN

REGISTRAR—SIGNATURE		DATE RECEIVED BY LOCAL REGISTRAR Month Day Year
11a. F.URBAN-MD	R D Nashold State Registrar	11b. November 7, 1957

This is to certify that this is a true and correct Reproduction of the record filed in the Wisconsin Department of Health and Social Services, Division of Health.

Date: SEP 2 6 1994

R D Nashold

R.D. Nashold, Ph.D.
State Registrar

This record has a raised seal. It is illegal to copy it.

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(2)

No. 01-1853

Supreme Court, U.S.
FILED
JUL 22 2002
CLERK

In The
Supreme Court of the United States

In the Matter of the Estate of
Marshall G. Gardiner, Deceased

J'NOEL GARDINER, PH.D.,

Petitioner,

v.

JOSEPH M. GARDINER, III,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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Dated: July 22, 2002

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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6192

QUESTION PRESENTED

This case involves the claim of J'Noel Ball, a/k/a J'Noel Gardiner,[1] a post-operative male-to-female transsexual, to a spousal share of the estate of Marshall G. Gardiner, deceased. J'Noel was born a male, but voluntarily elected to undergo "sexual reassignment surgery". At the completion of the process, J'Noel obtained a birth certificate from the State of Wisconsin changing her sex from male to female. In contrast, Marshall G. Gardiner was born a male on August 27, 1912 and remained a male until his death on August 12, 1999.

Kansas requires that in order for a marriage to be valid, the parties to the marriage must be of the "opposite sex". K.S.A. 23-101. The issue presented at the outset of this case was simply: "Was J'Noel a male or female at the time of her purported marriage to Marshall G. Gardiner?" If she is a female, she would be entitled to a spousal share of his estate.[2] If she is a male, the marriage is void. In the Court below, it ruled that K.S.A. 2001 Supp. 23-101 and K.S.A. 2001 Supp. 23-115 requires Kansas to recognize only traditional marriages. The Kansas Supreme Court ruled that pursuant to K.S.A. 2001 Supp. 23-101, a marriage between a post-operative male-to-female transsexual and a male is void and against the public policy of the State of Kansas. Specifically and to the point, it held that since

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[1] For purposes of this Response, J'Noel Gardiner, a/k/a J'Noel Ball will simply be referred to as "J'Noel".

[2] The exact amount of her share remains an issue in the probate case.

QUESTION PRESENTED – Continued

K.S.A. 2001 Supp. 23-101 was silent on the subject matter of transsexuals, they are simply not included within the traditional definition of male and female. The Kansas Court found that if the Kansas legislature had intended to include transsexuals it would have been a simple matter to have done so. In conclusion, the Kansas Court stated, "We do not read into the statute something that does not come within the wording of the statute." Pet., App. 38a.[3]

The narrow question framed by the Petitioner is whether Article 4, Clause 1 of the Constitution of the United States requires full faith and credit to be given to the Wisconsin birth certificate stating that J'Noel is a female. Petitioner urges this result notwithstanding the fact that the Kansas Supreme Court found that such a result would violate the public policy of Kansas concerning traditional marriages.

The Leavenworth County District Court, the Kansas Court of Appeals, and the Kansas Supreme Court all found that the birth certificate issued by the State of Wisconsin was not entitled to full faith and credit for the reasons set forth in the opinions below.

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[3] This rationale apparently follows the statement of Justice Scalia who wrote: "[I]t is simply not compatible with democratic theory that laws mean what they ought to mean, and that unelected judges decide what that is." Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 38 (1997).

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Kansas Supreme Court entered on June 12, 2002.

STATEMENT OF THE CASE

The fascinating facts of this case are stated in great detail in the briefs and opinions below. However, there are additional relevant facts which merit attention. Some facts are repeated herein to give the Statement of the Case continuity.

Joseph M. Gardiner, III ("Joe"), is the adult son and sole heir-at-law of the decedent, Marshall G. Gardiner. Pet., App. 43a. Marshall G. Gardiner ("Marshall") was born a male in Oskaloosa, Kansas in 1912 and lived in the Leavenworth area his entire life. Marshall married Molly North in 1942. Joe was born to Molly and Marshall in 1947. Pet., App. 45a. Molly died in 1984. Marshall met J'Noel in May of 1998 at a function sponsored by Park University. 1 Record on Appeal 118. Marshall was a substantial financial contributor to the school. J'Noel was a new associate professor of finance. 1 Record on Appeal 118. Marshall and J'Noel began dating and were discussing marriage within a month of their introduction by Park University. Pet., App. 46a.

However, Marshall demanded a premarital agreement prior to marriage. 1 Record on Appeal 208. J'Noel testified

that she[4] also wanted a premarital agreement to prove to Marshall she was not marrying him for his money. 1 Record on Appeal 123. At the time, Marshall had a net worth of approximately $2,500,000; J'Noel's net worth was approximately $40,000. 1 Record on Appeal 118.

J'Noel testified she could never get Marshall to focus on the premarital agreement, but the chronology makes it clear Marshall was not getting married without one. 1 Record on Appeal 187. Two days after J'Noel filled out and signed a form premarital agreement, Marshall obtained a marriage license. 1 Record on Appeal 152, 166a. Two months passed and no ceremony occurred, and J'Noel could not get Marshall to complete the agreement. Unable to reach an agreement on the prenuptial issue, J'Noel prepared and signed a document that on its face waives her inheritance rights. 1 Record on Appeal 166, 187. This "waiver" was authored, prepared and signed by J'Noel in lieu of the form premarital agreement she had previously signed. 1 Record on Appeal 119, 187. J'Noel testified she prepared this "waiver" to force a resolution of this premarital agreement issue. J'Noel also testified that she told Marshall on numerous occasions that she was not marrying him for his money. 1 Record on Appeal 184, 187.

On September 25, 1998, six days after J'Noel authored and signed the waiver, Marshall and J'Noel participated in a marriage ceremony performed in Oskaloosa, Kansas. 1

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[4] The sex of J'Noel is an issue in this case. As a courtesy to J'Noel, who prefers this form of address, the feminine pronoun will be used throughout even though J'Noel remains a male.

Record on Appeal 119, 187. At that time, Marshall was 85 years old. J'Noel was 40. 1 Record on Appeal 116, 118.

The presentation of this scenario is important for the reason that the Petitioner attempts to paint the picture that Joe and Marshall were estranged and that his actions in the probate court were induced by improper motives. This is simply not the case.

Originally, Joe opposed J'Noel's spousal claim based solely on the waiver, but then discovered that J'Noel was born Jay Noel Ball, a male. 1 Record on Appeal 36, 66. Joe then amended his objection to include the defense that J'Noel is a male and any purported marriage between J'Noel and Marshall was therefore void. 1 Record on Appeal 66, 132-141.

All parties agree J'Noel was born a male in Wisconsin in 1957. 1 Record on Appeal 117, 172a, 2 Record on Appeal 545, 4 Record on Appeal 773-782. J'Noel testified in her deposition that she considered the fact that she was born with male genitalia to be a "birth defect". 1 Record on Appeal 178-178a.

J'Noel's original birth certificate, issued in Wisconsin, indicates that J'Noel was born a male. 1 Record on Appeal 232. Pursuant to a Report of Order dated August 8, 1994, an altered birth certificate was issued at J'Noel's request after a cosmetic surgery which indicates that J'Noel was born female. 1 Record on Appeal 233, 234.

Neither Marshall, Joe nor the State of Kansas were parties to the *ex parte* ministerial procedure in Wisconsin through which J'Noel's birth certificate was altered. 1 Record on Appeal 138; 4 Record on Appeal 773-782. The issue of J'Noel marrying Marshall or any other man in

Kansas was not raised in the *ex parte* hearing through which J'Noel changed her birth certificate. 1 Record on Appeal 138; 4 Record on Appeal 773-782. Petitioner submits no evidence or authority that the State of Wisconsin accepts J'Noel as a female for the purposes of marriage or inheritance. J'Noel bases her entire argument on the fact that she was able to procure a birth certificate reflecting a female status in the State of Wisconsin utilizing Wisconsin Statute §69.15(4)(b). Wisconsin courts have never passed on the validity of this statute and to the best of the knowledge of the Respondent the entire issue is unresolved in Wisconsin.[5]

REASONS FOR DENYING THE WRIT

I. The issue presented in J'Noel's Petition does not present a novel or new issue for this Court's review.

The issues raised by the Petitioner have already been presented to this Court in the case of *Littleton v. Prange*, 9

[5] Wisconsin has had "a definition of marriage" bill introduced each session since 1999 for its consideration. 1999 Assembly Bill 781 and 1999 Senate Bill 401. The bill defines marriage as being between one man and one woman and refuses Wisconsin's recognition of marriage other than between one man and one woman regardless of their validity in other jurisdictions. (Current law defines marriage as being between "husband and wife"). The intent of the Bill is to make sure that same sex marriages are not recognized in Wisconsin should another state decide to recognize it. The Bill has not passed as of the date of this Response.

S.W. 3d 223 (Tex.Civ.App.1999), *cert. denied*, 531 U.S. 872, 121 S.Ct. 174, 148 L.Ed.2d 119 (2000) and no new issues or arguments are presented in the petition.

On July 3, 2000, a Petition For Writ of Certiorari was filed in the case of *Christie Lee Littleton v. Dr. Mark A. Prange*, 9 S.W. 3d 223 (Tex.Civ.App.1999), *cert. denied*, 531 U.S. 872, 121 S.Ct. 174, 148 L.Ed.2d 119 (2000). A copy of the Petition is reproduced herein. Pet., App. 1a.

The *Littleton* case has been cited as legal precedent in every proceeding in the Courts below, albeit with different interpretations and applications.

The Petitioner in her brief fails to fully disclose that the very issues raised in her Petition were presented to this Court in the Petition on the *Littleton* case.

Respondent does not feel it is necessary to revisit all aspects of the Petition. The Petition in the *Littleton* case directly brought attention to the issue of amended official documents which indicate self-identifying sex.[6] The issue of full faith and credit and its relationship to an amended birth certificate obtained through an administrative process was fully and articulately briefed to this Court in the *Littleton* Petition. *See* App. 2, 6, 7, 9, 10, 11, 14, and 15.

There is nothing in J'Noel's Petition which warrants this Court to reconsider its previous decision not to grant a Writ of Certiorari concerning the issue of full faith and

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[6] The *Littleton* Petition provides a specific list of the states that have adopted such administrative procedures. App. 14. This list is apparently the same list referenced in Petitioner's Petition, at page 13.

credit. The Kansas Court of Appeals, in its decision relying on the *Littleton* case, presented a solid analysis as to why full faith and credit is not applicable to the case at hand. The Kansas Court of Appeals noted the similarities between the Kansas full faith and credit issue and the same issue as resolved by the *Littleton* case. Pet. App. 88a.

Judge Gernon's task was made much easier by reason of a unique Wisconsin Statute §69.21(1)(c) (2000) which reads:

> "Any certified copy of a vital record or part of a vital record issued under this subsection shall be deemed the same as the original vital record and shall be **prima facie evidence** of any fact stated in the vital record, **except** that **the evidentiary value** of a vital record filed more than one year after the event which is the subject of the vital record occurred or of **a vital record which has been amended shall be determined by the judicial or administrative agency or official before whom the vital record is offered as evidence.**"[7] (emphasis added).

Pet. App. 90a.

As Judge Gernon points out in his decision, both the original and amended birth certificates of J'Noel were presented to the District Court. The District Court, availing itself of Wisconsin's allowance to determine the

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[7] Wisconsin case law confirms that the original birth certificate is not conclusive evidence, but rather only *prima facie* evidence that can be rebutted and overcome by other evidence. *Lubnor v. Peerless Ins. Co.*, 120 N.W. 2d 54, 58 (Wis. 1963).

evidentiary weight to be given the birth certificate found it to be of no evidentiary value. Pet., App. 105a. It is clear that the Wisconsin statute contemplated a review of the administrative procedure by another state. In so doing, it opened the door to the reviewing state to make an independent decision as to whether or not the new birth certificate would violate the public policy of the reviewing state.

The Kansas Supreme Court properly exercised the discretion provided to it by the Wisconsin statute and found the marriage void because it violated the public policy of the State of Kansas.[8]

The Petitioner attempts to draw a strong correlation between the Wisconsin statute and the Kansas regulation which allows for an amended birth certificate to be issued subsequent to sexual reassignment surgery.[9] The Petitioner argues that Kansas has accepted transsexual marriages by reason of the adoption of this regulation. However, Judge Gernon, in his opinion in the Kansas Court of Appeals decision notes that the validity of this Kansas regulation is questionable.[10] He stated:

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[8] Kansas has declined to follow decisions from other states under the full faith and credit doctrine because they violated Kansas public policy. *State v. Pope*, 23 Kan. App. 2d 69, 927 P.2d 503, 511 (1996); *Head v. Platte County, Mo.*, 242 Kan. 442, 749 P.2d 6, 9 (1988); *Matter of Reed's Estate*, 233 Kan. 531, 664 P.2d 824 (1983). The public policy exception is widely recognized. *Gaillard v. Field*, 381 F.2d 25, 28 (10th Cir. 1967); *Application of Schatz*, 497 P.2d 153, 157 (Wash. 1972).

[9] K.A.R. 28-1720-20(b)(1)(A)(i).

[10] The authority to declare the public policy of the State of Kansas is vested in the legislature, not in the administrative agency. *Kansas*

(Continued on following page)

> "Here, it appears likely that, to the extent the regulation appears to allow for the change of sex designation on a Kansas birth certificate to respond to anatomical changes, it oversteps. It is highly unlikely a fundamental change of that nature was contemplated by the legislature when it passed K.S.A. 2000 Supp. 65-2422(c) on 'minor corrections'."

Pet. App. 88a.

If the Wisconsin statute were presented to the Wisconsin court today, the result would most likely be the same.

II. There is no actual conflict or issue as to whether the Wisconsin birth certificate is entitled to full faith and credit in Kansas.

The Petitioner argues that the full faith and credit clause requires the same exacting application to executive actions and non-adjudicatory court action that it does to judgments issued in one state between parties to an adjudication over a controversy that has been reduced to a judgment.

The rule, urged upon this court by the Petitioner, would require the expansion of the application of the full faith and credit clause to all records and public acts of all states. The full faith and credit obligation is exacting and is presently reserved for judgments issued in one state by a court with adjudicatory authority over the subject

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Human Rights Commission v. Topeka Golf Association, 18 Kan. App. 2d 581, 856 P.2d 515, 520 (1993).

matter and persons governed by the judgment. *Baker v. General Motors Corporation,* 522 U.S. 222, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998).

There are two general situations where a state must decide if a legal event in another state is entitled to full faith and credit under the full faith and credit clause of the United States Constitution. The Constitution's full faith and credit clause provides,

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and The Effect thereof." Art. IV, §1.

The precedent which has previously been laid down from this court differentiates the credit owed to laws (legislative measures and common law) and to judgments when it comes to the application of the full faith and credit clause of the United States Constitution. *Baker v. General Motors Corp., supra.* From the decisions of this Court two distinct rules of law have evolved to assist the various State Courts faced with the challenge of determining when and under what circumstances the public records, acts, and judgments, of the sister states shall be given "full faith and credit" in judicial proceedings in the interpreting state that occurred in a foreign state. Regarding judgments, the full faith and credit obligation is exacting. *Baker v. General Motors Corporation, supra.* A final judgment in one state, if rendered by a Court with adjudicatory authority over the subject matter and persons governed by the judgment qualifies for recognition throughout the land. *Baker v. General Motors Corporation, supra.* The full faith and credit clause does not compel "a

state to substitute the statutes of other states for its own statutes dealing with a subject matter which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S.Ct. 629 (1939).

Full faith and credit treatment forbids the second state from questioning a judgment rendered in a sister state. When presented to the courts of the second state, a judgment may not be denied enforcement based upon some disagreement with the "public policy" between the judgment and the law of the state of rendition. However, this does not mean that all judgments from one state must be blindly enforced in another, or that all judgments are subject to full faith and credit treatment. All judgments are not subject to full faith and credit treatment. *Baker v. General Motors Corp., supra.* An injunction rendered in Michigan does not necessarily apply to litigation between differing parties conducted in Missouri. *Baker v. General Motors Corp., supra.*

In the instant issue, however, there is no judgment rendered in one state over an adjudication. The public act that the Petitioner would have this Court apply the exacting standards of the full faith and credit clause (as it applies to the application of judgments) was the reissuance or amendment of the Petitioner's birth certificate in the State of Wisconsin. There was no adjudication between contesting parties. The actions taken by the Petitioner in Wisconsin were *ex parte*, ministerial in nature, and were taken by an agency within the executive branch of the State of Wisconsin, Wisconsin's Department of Vital Statistics. Here, the application of the full faith and credit clause, if applied in the manner urged upon this Court by the Petitioner, would completely remove and vacate all of the

precedent of this Court, vacate the decisions differentiating the credit owed to laws (legislative measures and common law), and that credit owed to judgments, and apply to all actions the same exacting standards that are presently required in the application of a full faith and credit clause analysis to judgments. This is a radical departure from the precedents this Court has laid down over the past 200 years and is best done, if at all, by the legislature, and not by unelected judges.

The trial court, the Kansas Court of Appeals, and the Kansas Supreme Court, in the instant case, all found no conflict between the full faith and credit clause and the decision not to recognize J'Noel Gardiner as a female for purposes of the Kansas Marriage Act. K.S.A. 23-101. In the instant case, of course, Marshall G. Gardiner (nor his estate) was not a party to the earlier "litigation" nor was he subject to the jurisdiction of the Wisconsin courts.

It has been stated that the beginning point of any full faith and credit analysis requires a determination of the effect the "judgment" has in the court of the issuing state. Following that protocol for a full faith and credit analysis establishes that the "judgment" that the Petitioner would seek to force upon Kansas and 48 other sister states is in fact, and was at the time of its taking, merely a ministerial act by an executive agency of the State of Wisconsin. Wis. Stat. Ann. §69.21(1)(c) (2000). Wisconsin authorized, through an *ex parte* court order, the Petitioner to cause her birth certificate maintained by an executive agency in the State of Wisconsin to be amended to reflect that she was born a female when, in fact, she was born male. J'Noel Gardiner remains male today. The force and effect of the alleged judgment from Wisconsin did not change J'Noel

from male to female. The legal force and effect of this action in Wisconsin, whether the same is styled a judgment or an administrative agency action, is nil. It changed the wording of her birth certificate from male to female. The statute that authorized and directed the administrative agency to take these actions and that maintained the records of birth in the State of Wisconsin also authorizes any court to put whatever evidentiary weight that court deems appropriate and lawful upon the subsequently issued amended birth certificate. The Wisconsin statute does not prevent any subsequent forum in or out of the State of Wisconsin from putting differential evidentiary values on such an amended certificate. Kansas did not blindly apply the label "female" to J'Noel Gardiner when Kansas determined the validity of the Petitioner's marriage to one of its citizens, Marshall G. Gardiner, who was at all times a Kansas resident. No violence was done to the full faith and credit clause of the United States Constitution by the State of Kansas. The Kansas court examined the actions taken in Wisconsin and determined that irrespective of those actions, and irrespective of whether or not they occurred in the executive branch, the judicial branch, or came about only as a result of actions taken in both branches, Kansas remained free to define which of its citizens may marry and under what circumstances, under Kansas law. This does no violence to the full faith and credit clause. This does not interfere with any of the force and effect of the actions taken in Wisconsin. This is in congress with the law of the State of Wisconsin. Petitioner's argument that there exists a distinction between the evidentiary value of a vital record which has been amended, and its substantive effect is to misapply Wisconsin Statute §69.21(1)(c). Clearly, through a plain interpretation of the statute, the trial court in Kansas correctly

decided that it could, irrespective of the sex that the Wisconsin document purported to record the Petitioner as being, entertain parole evidence on the point. Kansas gave the amended Wisconsin birth certificate all of the full faith and credit that the Wisconsin action was entitled to under the prior decisions of the United States Supreme Court and Wisconsin law.

Nowhere in the history of this litigation has the Petitioner urged upon any court below the proposition that the Kansas courts could not entertain parole evidence on the issue of the Petitioner's sex, merely because the Wisconsin *ex parte* court proceedings had resulted in a Wisconsin administrative agency modifying retroactively the Petitioner's birth certificate. This is the rule that the Petitioner would have this court adopt through the vehicle of applying the full faith and credit clause. That was clearly not the intention of the framers of the Constitution, nor is it in concert with the prior rulings of this court. Rules of evidence are procedural, not substantive. *Restatement (Second) of Conflict of Laws*, §137-139 (1969 and Rev. 1998). State procedural rules are not entitled to full faith and credit in a sister state. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

If the first step in a full faith and credit analysis is to determine the effect that a judgment has in the issuing state, and that protocol is followed here, and the state court that issued the order would not give preclusive effect to the prior judgment, then the State of Kansas is under no requirement to provide greater efficacy to the Wisconsin action. *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *Union and Planters Bank v. Memphis*, 189 U.S. 71, 23 S.Ct. [illegible] 47 L.Ed. 712 (1903).

A conclusion that the issuing state would not give the prior judgment preclusive effect ends the inquiry making it unnecessary to determine the existence of any exception to full faith and credit. *Haring v. Prosise*, 462 U.S. 306 at 313, 314, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983).

If this court honors the "undoubted"[11] principle that courts need give a prior judgment no more force or effect than the issuing state gives it, then this court will deny the Petitioner's request for a Writ of Certiorari.

The Petitioner seeks a Writ of Certiorari arguing that Kansas denied full faith and credit to a judgment of a sister State, Wisconsin. However, Kansas in its decisional processing, examined the law in Wisconsin, the actions taken in the State of Wisconsin that resulted in the Petitioner receiving an amended birth certificate, and decided that Kansas could determine whether or not the Petitioner was male or female for purposes of the Kansas Marriage Act, K.S.A. 23-101, without violating the full faith and credit clause. Kansas merely applied Wisconsin Statute §69.21(1)(c) (2000) and examined parole evidence in order to determine what evidentiary value, if any, to place on the amended Wisconsin birth certificate. This statute clearly allows parole evidence. How a Court, tribunal, or other judicial officer could possibly determine the evidentiary

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[11] Concurring opinion of Justice Kennedy, Justice O'Connor, and Justice Thomas joined concurring in the judgment in *Baker v. General Motors Corporation*, 522 U.S. 222, 118 S.Ct. 657. These Justices concurred in the judgment of the Court which delivered the opinion in *Baker v. General Motors Corporation*, 522 U.S. 222 (1998) but did so utilizing a separate analysis.

value of an instrument amended, altered or reissued pursuant to the Wisconsin statute without the consideration of parole evidence is not explained by the Petitioner. This is no doubt because the Petitioner is in fact advancing an argument that no parole evidence can be considered without violating the full faith and credit clause. The Petitioner advances this argument notwithstanding the literal language of the Wisconsin statute which clearly states that a certified copy of a vital record is *prima facie* evidence of any facts stated in the vital records. The Wisconsin statute then goes on to say that there exists an exception to this *prima facie* rule for vital records filed more than one year after the event and, the evidentiary value of a vital record which has been amended shall be determined by "the judicial or administrative agency or official for whom the vital record is offered." Wis. Stat. Ann. §69.21(1)(c) (2000). Kansas did so correctly.

The simple fact is that Marshall G. Gardiner, his estate, and his son, were not parties to the Wisconsin proceeding. Nothing presented to the Kansas courts indicated that Wisconsin would take the novel assertion that its earlier issuance of a birth certificate changing the Petitioner's reported sex from male to female binds the State of Kansas (or any other party not before a Wisconsin court, and not otherwise subject to the jurisdiction of Wisconsin), to accept J'Noel Ball as female for all purposes and determines those absent parties' rights under Kansas law. Marshall G. Gardiner, subsequently his estate, and Joseph M. Gardiner, III, were not parties to the Petitioner's Wisconsin proceedings to change her birth certificate and had no opportunity to litigate the issue of J'Noel Ball, a/k/a J'Noel Gardiner's sex at the time of the birth

certificate's change. It can hardly be concluded that Wisconsin will prohibit Marshall G. Gardiner, Joseph M. Gardiner, III, or any of the parties who may succeed to their interest from challenging J'Noel's status as a female, merely because J'Noel Gardiner, then J'Noel Ball, availed herself of an administrative method whereby she could change her birth certificate from her reported sex at birth of male, to that of female.

Nothing in the Wisconsin order purports to have the authority to prevent any subsequent party who deals with J'Noel from challenging her in her asserted claim that she is a female. This, however, is the result that the Petitioner would have this court adopt. It is the logical result of following her argument to its logical conclusion. Put another way, her argument is this,

> I was born biologically a male. My chromosomes are that of a male, XY. I grew up a male. I married a female. I conducted myself outwardly as a male through the majority of my adult life. After my marriage to a female I came to grips with the fact that I had a mental illness, gender dysphoria. I now believe I am a female trapped in a male's body. I believe my male sexual organs were a 'birth defect'. I underwent surgery to remove certain of my male reproductive organs and have certain of my male reproductive organs altered to appear as female. I availed myself of an administrative procedure which allows me to go back to my state of birth and have a birth certificate reissued recording me as 'female' vs. my original as well as my chromosomal sex as male. Now that I have done that, no state anywhere, at any time, for any reason, can challenge my status as being a 'female', nor can any person for any reason ever challenge my status as a 'female'.

> This is so because those persons did not anticipate that I would, (in an *ex parte* proceeding) have the State of origin of my birth certificate issue an order which changed the actual sex on my original birth certificate from male to my desired sex of female. They failed to enter an appearance in that State court and they failed to object. No one can challenge my status as 'female' in any court except Wisconsin because to do so would be to violate the full faith and credit clause of the U.S. Constitution.

This is the logical conclusion that J'Noel would have this court apply through the vehicle of the full faith and credit clause. Her argument literally taken would prohibit any state, anywhere, at any time, from entertaining parole evidence as to her true sexual status. This, the Kansas Supreme Court and trial court declined to do. This the full faith and credit clause does not require.

III. The Congress of the United States has prescribed the manner in which this type of record shall be proved and the effect thereof.

There are additional reasons to deny the Writ independent of the arguments set forth above. The Defense Of Marriage Act, hereafter DOMA, 28 U.S.C.A. §1738c (1996) is the only general law the Congress of the United States has passed on the subject of marriage and what full faith and credit states must give to marriages in other states. The Congress of the United States has specifically legislated that "same sex" marriages entered into in sister states are not subject to the full faith and credit clause of the United States Constitution. DOMA, *supra*, specifically protects states from having to give full faith and credit to same sex marriages performed in a foreign State. In the

instant case, had the Petitioner entered into a marriage in a foreign state and had this issue been presented in the State of Kansas, under the general laws prescribed by Congress, DOMA, *supra*, Kansas would have been free to determine that that marriage was void under Kansas law without doing any injury to the full faith and credit clause of the United States Constitution. 28 U.S.C.A. §1738c, *Christie Lee Littleton v. Dr. Mark A. Prange, cert. denied.*, 531 U.S. 872, 121 S.Ct. 174, 148 L.Ed.2d 1119 (2000).

In fact, Congress had an opportunity at the time it entertained the passage of DOMA, *supra*, to address the issue of what full faith and credit the states should give to situations wherein an individual suffering from gender dysphoria had undergone sexual reassignment surgery, and subsequently obtained an amended, modified, or reissued birth certificate, and specifically declined to include any provision within the DOMA, *supra*, to require states to provide full faith and credit to those "acts and records" of foreign states. This is the very question that Kansas was presented with in the instant issue. That is, must Kansas give full faith and credit to a birth certificate that had been reissued, modified or amended, in a foreign state, as a result of sexual reassignment surgery. The Congress of the United States was reluctant to force upon 49 states through the vehicle of the full faith and credit clause, and DOMA, *supra*, the requirement that all states be pre-empted from applying their individual law on this issue and be required to adopt a regulation passed by any one state which has a procedure similar to the procedure utilized by the Petitioner here in the State of Wisconsin. It is the Congress of the United States, which has been charged by Article 4, Clause 1 of the Constitution, the full faith and credit clause, with the duty to prescribe the

manner in which the acts, records and proceedings of one state should be given full faith and credit by Courts of another state. That body has specifically declined to entertain the very proposition that the Petitioner suggests that this Court entertain by the issuance of a Writ of Certiorari. The Petitioner is in fact arguing that because Congress has not provided the remedy the Petitioner would desire, after Congress had an opportunity to do so in 1996, and every year in which the Congress has been in session since, that this Court should legislate by the vehicle of a judicial decision a remedy unavailable to the Petitioner through a general law of the Congress of the United States. In the first instance, it is the Congress of the United States which is tasked under Article 4, Clause 1 with the authority to prescribe the manner in which acts, records and proceedings shall be given full faith and credit among the various states. Constitution of the United States, Article 4, Clause 1. The novel approach of the Petitioner is that inasmuch as Congress has been reluctant to express its opinion, other than through DOMA and, that opinion is not favorable to the Petitioner's position, then this Court should correct that situation by rendering a decision legislative in nature, that the legislative branch of the government, the Congress assembled, has specifically declined to do. This is not the traditional role of the United States Supreme Court.

CONCLUSION

The Petitioner's argument would have this Court by the vehicle of a Writ of Certiorari adopt an entirely new analysis to the application of full faith and credit treatment to the acts, records and judgments of one State by another

State. The Petitioner's argument can be restated as follows:

> Wisconsin issued a birth certificate describing the Petitioner as 'female', and this was done through the vehicle of a combination of an *ex parte* Court order and a ministerial act within a governmental agency. Such events pre-empt foreign states from entertaining any parole evidence to determine whether or not that individual in fact meets the gender characteristics described in the newly acquired instrument from a foreign state.

This analysis is simplistic, and novel. It has never been adopted by this Court. The Petitioner boldly argues that the "relaxed standards governing the application of a foreign state's substantive law"[12] should in effect be abandoned by this Court. The Petitioner would have this Court apply the same exacting standards that are presently applied to judgments,[13] to any and all public acts and records of a foreign state. The Petitioner's rule if adopted by this court, would hold all states hostage to any one state which decided to adopt a procedure whereby sexual reassignment surgery could result in the issuance of a

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[12] Petition for Writ of Certiorari, p. 18.

[13] As used here, the term judgment means a judgment which is preclusive on the parties and preclusive on the issues. These judgments have historically been granted full faith and credit by all states, regardless of the hostility that the state of rendition may have with the underlying legal principles which support that judgment. *Baker v. General Motors Corp.*, 522 U.S. 222, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998).

modified or amended birth certificate changing the original sex of a citizen to that of the sex of that citizen's particular choice. Such an approach would cause the wholesale abandonment of the entire body of *juris prudence* articulated by this Court under the full faith and credit clause, ignore the general law of the Congress of the United States and, all of the prior opinions of this Court on this point. The full faith and credit clause has never had, nor was it intended by the framers of either the Articles of Confederation or the Constitution of the United States to grant such broad and sweeping authority to a single state. The rule urged upon this Court by the Petitioner would allow one state to control the definition of who may marry and under what circumstances in all 50 states, the country's territories, possessions and its commonwealth.

This Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: July 22, 2002

App. 1

No. ___

IN THE
Supreme Court of the United States

CHRISTIE LEE LITTLETON,

Petitioner,

v.

DR. MARK A. PRANGE,

Respondent.

On Petition for Writ Of Certiorari
To The
Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

(Filed July 03, 2000)

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QUESTIONS PRESENTED

The denial of the petition for discretionary review and the motion for rehearing by the Supreme Court of Texas, leaving the opinion of the Fourth Court of Appeals District of Texas intact, presents fundamental statutory and constitutional issues concerning the Full Faith and Credit provisions of Article IV, § 1, and, the equal protection clause of Amendment XIV, of the Constitution of the United States.

1. Whether Texas violated the Full Faith and Credit clause of Art. IV, § 1, in voiding a transsexual's constitutionally protected, private and intimate marital relationship, as a member of her medically assigned genital sex to a person of the opposite genital sex, without a compelling and sufficient state interest or proper governmental objective.

2. Whether the Equal Protection clause of Amendment XIV, applies equally to all women, including those who medical professionals identify as women, at birth or later, and, consequently, to all heterosexual marriages, regardless of whether the parties' genitals were present at birth or medically formed.

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PETITION FOR WRIT OF CERTIORARI

Christie Lee Littleton (hereinafter, "Mrs. Littleton") petitions for a writ of certiorari to review the decision of the Fourth Court of Appeals District of Texas, Opinion, having been denied discretionary review by the Texas Supreme Court.

OPINIONS BELOW

The opinion of the Fourth Court of Appeals (App. C 1-25) is reported at 9 S.W.3d 223 (Tex. App., 1999). The denial of discretionary review by the Texas Supreme Court (App. A 1) is reported at 10 S.W.3d No.2, SCTOL-4 (Tex.,

Mar. 14, 2000). The order denying motion for rehearing of the petition for review by the Texas Supreme Court (App. B 1) is reported at 15 S.W.3d No.2, SCTOL-2 (Tex., May 30, 2000).

JURISDICTION

The order denying discretionary review was entered by the Texas Supreme Court on March 2, 2000. (App. A 1.) The judgment of the Fourth Court of Appeals was entered on October 27, 1999. (App. C 1-25.) A motion for rehearing was timely filed with the Texas Supreme Court on April 18, 2000, which motion was denied on May 18, 2000. (App. B 1.) Petitioner states that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, to review this petition for certiorari.

CONSTITUTIONAL PROVISIONS

1. ARTICLE IV, Section 1, of the United States Constitution provides in pertinent part:

Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

2. AMENDMENT IX of the United States Constitution provides in pertinent part:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

3. AMENDMENT XIV, Section 1, of the United States Constitution provides in pertinent part:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case concerns the right of transsexuals to have their state sanctioned marriages recognized in a sister state when the transsexual changes state residence. It also involves a fundamental conflict among the states regarding the transsexual's right and ability to marry.

Specifically, the broad fundamental question is whether a legal marriage contract entered into in one state shall be given Full Faith and Credit by all sister states. Flowing from that question are two equally important questions. First, whether a transsexual is entitled to have her legal sex conform with the sex recognized by medical professionals, defined as the medically confirmed genital sex of the post-operative status, or, as the sex stated on an original birth record. And, second, whether the constitutionally protected right to marry extends to transsexuals.

As a constitutional matter, this case presents to this Court its first opportunity to answer the questions of whether the protections afforded to both men and women

under all the laws of our country apply equally to transsexual men and transsexual women, and settling divergent, and often opposing, decisions among several states, as well as the federal courts. In so doing, this case presents this Court with the opportunity to define what is a "male" and what is a "female."

The constitutional issues of full faith and credit and equal protection, as applied to the States by Amendment XIV, were first raised following the issuance of the written opinion of the Court of Appeals, Fourth District, 9 S.W.3d 223 (Tex. App., 1999) (App. C 1-25), where the appellate court issued an opinion and ruling that used criteria, including religious belief, supposition, and the federal Defense of Marriage Act, 28 U.S.C.A. §1738C (1996) rather than address the stipulated evidence and entire body of case law on this subject.

The Petitioner addressed these issues in the petition for discretionary review and motion for rehearing before the Supreme Court of Texas.

STATEMENT OF THE FACTS

Christie Lee (Cavazos) Littleton legally married Jonathan Mark Littleton[1] in Kentucky on December 31, 1989. On July 29, 1996, Mr. Littleton died as the result of alleged medical malpractice by Dr. Mark A. Prange. Mrs.

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[1] Since the early filings with Mrs. Littleton's previous counsel, her husband's first name has been repeatedly misspelled and all prior documents and court opinions have continued that misspelling. As her new counsel, we wish to respect the memory of Mr. Littleton, and have used the correct spelling of his first name throughout this Petition.

Littleton, along with the decedent's mother and the decedent's children by a previous marriage, filed suit for the wrongful death of Mrs. Littleton's husband against Dr. Prange.

In the course of discovery, Dr. Prange's counsel became aware that Mrs. Littleton's birth certificate stated, "Lee V. Cavazos, Jr., a male, born March 29, 1952." Mrs. Littleton freely disclosed that in 1977, she had petitioned a local Texas District Court for a legal change of name from Lee V. Cavazos, Jr. to a Christie Lee Cavazos. She also freely disclosed that in 1979, she had undergone corrective genital reassignment surgery.

In 1980, following the final stage of her corrective surgery, she applied for and Texas government officials issued a State of Texas, Department of Public Safety Identification Card, which indicated "SEX: F[emale]." The identification card application was supported by appropriate documentation, including the Texas District Court's Order changing the Petitioner's name and a sworn medical affidavit from her physician-surgeon (who had been salaried in part by the State of Texas).

The State of Texas, Department of Public Safety Identification Card was secured without any fraud: all parties (the Court, the Department's clerks and supervisors, and the physician-surgeon) were aware of everything about Mrs. Littleton's past, her transition, and her medical corrective genital reassignment surgery.

In 1988, Mrs. Littleton temporarily moved to Kentucky at which time she met Jonathan Mark Littleton. Using as identification her State of Texas, Department of Public Safety Identification Card, she and Jonathan Mark Littleton applied for and obtained a Kentucky marriage

license, indicating she as "bride" and he as "groom," and were legally married in Kentucky. Shortly, thereafter, the Littletons moved to Texas.

During the course of their six and one-half year marriage, the Littleton's, as many married couples, engaged in private, intimate, heterosexual vaginal-penile[2] sexual intercourse. They also filed federal income taxes as husband and wife, walked hand in hand along San Antonio's Riverwalk, enjoyed each other's companionship and company, and, were known in the community as husband and wife. They lived and loved, happily together, as husband and wife, until Jonathan Mark Littleton's untimely death in 1996.

Following discovery of Mrs. Littleton's medical past, Dr. Prange's counsel moved the trial court for and was granted a Partial Summary Judgment And Order Of Severance and a Modified Final Partial Summary Judgment And Order against Mrs. Littleton, alone.

The trial court did not take testimony. However, the parties had stipulated and submitted to two medical affidavits, both stating that Mrs. Littleton "is medically a female." *Littleton* at 232 (App. C 22).

The court ignored the medical evidence and Mrs. Littleton's amended birth certificate and dismissed Mrs. Littleton's cause of action based solely on the fact that her original birth certificate stated she was a male.

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[2] We apologize for what may seem overly graphic language, however, to accurately discuss the legal implications in this case on transsexuals and the intersexed, we cannot avoid using the correct medical terminology.

ARGUMENT AND REASONS FOR GRANTING THE PETITION

This Court should grant this petition for several reasons.

TEXAS VIOLATED THE FULL FAITH AND CREDIT CLAUSE OF ART. IV, § 1, IN VOIDING A TRANSSEXUAL'S CONSTITUTIONALLY PROTECTED, PRIVATE AND INTIMATE MARITAL RELATIONSHIP, AS A MEMBER OF HER MEDICALLY ASSIGNED GENITAL SEX TO A PERSON OF THE OPPOSITE GENITAL SEX, WITHOUT A COMPELLING AND SUFFICIENT STATE INTEREST OR PROPER GOVERNMENTAL OBJECTIVE.

Under the Constitution, Article IV, § 1, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The Texas court's decision to refuse to recognize acts and public records of the Commonwealth of Kentucky, in the form of the validity of a marriage, violates the Full Faith and Credit clause. The Full Faith and Credit clause "implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887).

By invalidating the Littleton's marriage, Texas failed to give Full Faith and Credit to the Acts, Records, and Proceedings of a sister state, the Commonwealth of Kentucky, and its own Acts, Records, and judicial Proceedings which were properly recognized in Kentucky. In this case, Texas not only participated in the direct funding and services, including psychological and medical, needed for Mrs. Littleton, to correct and alter her genital sex from

male to female (Acts), but, additionally, approved and issued a State of Texas, Department of Public Safety Identification Card (Records), based upon two documents. The first document is a court order changing her name (judicial Proceeding). The second document is a sworn affidavit from her physician-surgeon indicating completion of corrective genital reassignment surgery. The analysis contained in the majority opinion of the Texas Court of Appeals invalidating the Kentucky marriage, failed to look at either the underlying Texas acts, records, and judicial proceedings, given Full Faith and Credit by the Commonwealth of Kentucky, or the human being before it.

The Littleton's *heterosexual* marriage was converted into a "same-sex" marriage only for the purpose of denying a transsexual female the right to seek redress for the death of her spouse at the hands of his physician.[3] The record does not contain any evidence that, at the time of the marriage, the Petitioner was anything but female. In fact, by stipulation, the record contains two affidavits stating that Christie Lee Littleton was medically a female.[4]

In contrast to the *Littleton* case, where corrective genital reassignment surgery completed the transition, the case of *B. v. B.*, 78 Misc.2d 112, 335 N.Y.S.2d 712 (1974), presented the opposite case of a female to male transsexual who had undergone a hysterectomy and mastectomy

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[3] In fact, Dr. Prange settled with the remaining parties to the suit, brought by Mrs. Littleton, for an undisclosed sum following the court issuing summary judgment against Mrs. Littleton.

[4] Presumably from the date she completed the corrective genital reassignment surgery.

but had not had a phalloplasty, the deciding fact upon which the New York court used to determine that where a male lacks the ability to perform sexually as a male, no valid marriage could exist. The constitutional difficulty presented in *B. v. B.* is that of equal protection (discussed below). For example, a male who is injured, suffers from erectile dysfunction, or has had surgery (orchiectomy) related to testicular cancer, is medically no different than a female-to-male transsexual, who, for economic reasons, is unable to afford expensive phalloplasty. Both appear to the public as males, with beards, muscles, and a deepened voice.

To define maleness as the ability to penetrate and femaleness as the ability to procreate is antiquated, not to mention incomplete and inherently unjust.

THE EQUAL PROTECTION CLAUSE OF AMENDMENT XIV, APPLIES EQUALLY TO ALL WOMEN, INCLUDING THOSE WHO MEDICAL PROFESSIONALS IDENTIFY AS WOMEN, AT BIRTH OR LATER, AND TO THEIR HETEROSEXUAL MARRIAGES, REGARDLESS OF WHETHER THE PARTIES' GENITALS WERE PRESENT AT BIRTH OR MEDICALLY FORMED.

The trial and appellate courts chose to ignore the only evidence in the record, and chose to base their decisions on religious beliefs. Justice Hardberger states in the second opening paragraph of the Opinion in *Littleton*, at 223 (App. C 2),

> ***"The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably***

> ***fixed by our Creator at birth?"*** [Emphasis added.]

The above reference to a higher authority is the same rationale that had been used by racists and other bigots to justify segregation based on color, to justify hate crimes, and to justify discriminatory practices, and each was ultimately rejected by this Court as being Constitutionally prohibited, for example:

> *"Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."*

This pronouncement by the trial judge in *Loving v. Virginia*, 388 U.S. 1, 3 (1967), ultimately led to this Court's decision prohibiting anti-miscegenation statutes.

Next, the Court of Appeals of Texas, Fourth District, after ignoring the stipulated medical evidence, imposed its own "test" based on postulated genetic chromosome information.[5] Yet, neither Mrs. Littleton nor her deceased husband ever had a chromosome test. Thus, by granting and upholding Summary Judgment based on the aforementioned non-testing, and by assuming that the deceased Mr. Littleton was XY and Mrs. Littleton is *also* XY, the lower courts are requiring Mrs. Littleton to test herself

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[5] Based on unknown facts, as stated in *Jay v. Boyd*, 351 U.S. 345, 367 (1956), "No amount of legal reasoning by the Court and no rationalization that can be devised can disguise the fact that the use of anonymous information to banish people is not consistent with the principles of a free country."

and reveal that information in violation of Texas statutory public policy. Tex. Rev. Stat. Ann. Art. 9031 (Vernon 1999), which prohibits (with exceptions for which this case does not factually qualify) the use of genetic information by a "(8) State agency," defined to include the "judicial branch of state government."

Contrary to both Justice Hardberger's statement, *Littleton*, at 230 (App. C 14), and Justice Angelini's concurring opinion, *Id.*, at 231 (App. C 18), that the Texas Legislature has not spoken, the Texas Legislature has spoken on the confidentially of genetic testing. First in Tex. Rev. Stat. Ann. Art. 9031 (Vernon 1999), and then in Tex. Lab. Code Ann. § 21.402-21.403 (Vernon 1999) (prohibiting discrimination in employment based on genetic information). It may be of interest to this Court that the American Medical Association has spoken on the confidentiality of genetic testing. (See, AMA Code of Medical Ethics, Code of Medical Ethics, §§ 2.132, 2.135, 2.137, 5.08, and, 5.09 (1996-97). Texas does not have a statute requiring chromosomal testing as a prerequisite to marriage, nor does any other state.

Curiously, though not in the instant record, when it suited the purpose of the State of Texas, the Attorney General of Texas forced Mrs. Littleton, as the wife of Mr. Littleton in a community property state, to pay child support for Mr. Littleton's children from a prior marriage, even when he was ill and unemployed, as indicated on the Form 1040, jointly filed by the Littletons with the Internal Revenue Service.[6]

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[6] The IRS accepted eight joint Form 1040 filings for the six and one half-year marriage.

Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). Yet, as pointed out by the dissent in *Littleton*,

> "While a birth certificate would ordinarily establish a persons' gender conclusively, Christie presented significant controverting evidence that indicated she was female. This evidence was so substantial that it raised a genuine issue of material fact about where she was Jonathon's surviving spouse. In an ordinary summary judgment case, such controverting evidence would prevent this court from concluding that the movant had met its burden on a motion for summary judgment. But in this rather extraordinary case, *the majority has determined that there are no significant facts that need to be determined* and concluded that Christie is a male as a matter of law. *Despite this conclusion, there is no law to serve as the basis of this conclusion.*" [Emphasis added.]

Littleton, at 232. (App. C 22.)

A. Conflicting State And Federal Decisions

Texas' treatment of transsexuals as being capable of marriage for child support purposes, but declaring those same marriages void for estate purposes or wrongful death causes is contradictory and patently discriminatory. In this fact pattern the state has asserted one individual is female and the wife for collection of child support, and allowed a private litigant to claim that the same individual is male to prevent the wife from asserting her rights as the survivor of her husband.

Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male. The ability of Mrs. Littleton and many other transsexuals to freely travel, including travel without risk due to their sex status (e.g., which bathroom she may legally use), and to move and reside in many parts of this country is in question.

This case presents this Court with the opportunity to again correct and unify the path being traveled by the States with regard to the rights of citizens who are transsexuals, just as this Court has done for those individuals who have been subject to discrimination based on the classifications of race, sex, national origin, ethnicity, and religion.

There is no provision in any law, act, statute or ordinance in this land that abolishes or removes the rights of individuals to constitutionally protected freedoms if they choose to alter their being, in this case, by lawful, partially state-publicly funded, corrective genital reassignment surgery aimed at presenting a congruent self. This includes statutes that address the issue of gender transition more specifically than those of Texas, including that of Kentucky, the state in which the Littletons' marriage took place. *See* Ky. Rev. Stat. Ann. § 213.121 (5) (1999). Also significantly, neither the federal Defense of Marriage Act, 28 U.S.C.A. §1738C (1996), nor any of its

State counterparts, addresses the situation of a marriage involving a transsexual.

The only prior decision by this Court involving a transsexual was the case of *Farmer v. Brennan*, 511 U.S. 825 (1994), a unanimous decision (with concurring opinions). In *Farmer*, a pre-operative transsexual, who had undergone estrogen therapy, breast implants, and an "unsuccessful" orchiectomy, had been subject to discriminatory practices within the federal prison system. This Court remanded the matter to the lower courts instructing them to appropriately consider the transsexual's complaint.

Several jurisdictions in this country have addressed the problem posed by the facts of the *Littleton* case. For example, in *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975), a U.S. District Court held that there was "no state interest . . . whatsoever" in the arbitrary refusal to grant state recognition of a transsexual's "current sexual status."

In Ohio, a trial court published an opinion in the case *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828, 832 (Ohio Probate Court, 1987), a declaratory judgment action in which the court decided that a post-operative transsexual female (born in Ohio) was not allowed to marry a male (because Ohio does not have a law allowing amendment to birth records).

In New Jersey, the state Supreme Court, in the case *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204 (1976), upheld a marriage, between a transsexual female and a male, in awarding support and maintenance upon divorce.

Interpretation of the exact same fact pattern and Texas statutes at issue in the instant state case resulted in an opposite federal ruling in *Benefit Determinations Involving Validity of Marriage of Transsexual Veterans*, VAOPGCPREC 15-90, 05-25-90 8-23 Marriage 7-2 Med. Treat-Repro. Function Vet. Aff. Op. Gen. Couns. Prec. 15-90, 1990 WL 605201 (D.V.A.),[7] holding:

> "Under Texas law, where a veteran has anatomically changed his/her sex by undergoing sexual-reassignment surgery and has thereafter legally married a member of his/her former sex, his/her marriage partner may be considered the veteran's spouse for the purpose of determining entitlement to additional vocational rehabilitation allowance payable on account of a dependent spouse."

B. Recent International Decisions

Justice Thomas recognized in his concurring opinion in *Farmer*, that, "evolving standards of decency * * * mark the progress of a maturing society." *Ibid.*, at 859 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). Evolution has

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[7] In this case arising in Houston, Texas, the relevant facts before the Veteran's Administration included: transition in 1977, surgery in 1985, name change order in 1986, marriage in 1987, V.A. claim filed in 1988, Order to amend birth cert. 3/9/89, Tx Dept. of Health, Bureau of Vital Statistics amended birth record 5/10/89, appellate decision in 1990.

For comparison Mrs. Littleton's facts: transition about 1965, name change order in 1977, surgery in 1979, marriage in 1989, wrongful death law suit filed in 1997, Order to amend birth certificate in 8/7/98, Tx Dept. of Health, Bureau of Vital Statistics amended birth record 8/14/98, appellate decision in 1999.

not escaped the English case of *Corbett v. Corbett*, 2 All E.R.1 33 (P. 1970), (a reported trial level opinion which decided that for the purpose of marriage, chromosomes are dispositive and thus determine one's sex).

Many jurisdictions, around the world, that had previously followed the analysis in *Corbett*, Id., have evolved to expressly, and some forcefully, repudiate Judge Ormrod's inflexible edict. For example, as stated in an Australian repudiation,

> "Whatever may once have been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have.
>
> * * *
>
> "Negative attitudes towards transsexuals are based fundamentally on religious and moral views and assumptions which are slowly changing in modern society. . . . "

Secretary, Dept. of Social Security v. S.R.A. (1993) 118 A.L.R. 467, 472, 493 (Fed. Ct. Gen. Div. Australia).

In New Zealand, in *Attorney-General v. Otahuhu Family Court*, (1994) 1 NZLR 603, 607, "If society allows such persons to undergo therapy and surgery in order to fulfil that [the desire to alter their genital sex] desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry."

The Court of Justice of the European Communities, continuing the momentum against the *Corbett* philosophy, in an appeal of Case C-13/94, *P. v S. and Cornwall County Council*, a case originating in England, issued a Judgment Of The Court on April 30, 1996, stating in part, at paragraph 7, "Under English law [referring to *Corbett*], P. [who is a male-to-female transsexual] is still deemed to be male." Then, in overriding England's assertion, this highest European Court stated,

> "21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.
>
> "22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."

C. Equal protection includes all women.

The marital relationship, held as a right so basic and fundamental and so deeply-rooted in our society, while not mentioned specifically in the Constitution, has been determined, in a concurring opinion of this Court, to be one of those unremunerated rights within the Amendment IX. *Griswold v. Connecticut*, 381 U.S. 479, 488, 491, 492, 499, 502 (1965). Additionally, this fundamental right is protected under the Amendment XIV, due process clause.

Loving, supra, at 12; *Griswold, supra*, at 486; *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978).

Under cases beginning with *Griswold v. Connecticut*, 81 U.S. 479 (1965), and heightened by *Roe v. Wade*, 410 U.S. 113 (1973), a fundamental right, such as marriage, carries with it the burden on government that any restraint be justified under a "compelling state interest" analysis. Further, following *United States v. Virginia*, 518 U.S. 515, 533 (1996), this Court directed the focus of a reviewing court to determine whether the state's justification is "exceedingly persuasive."

Marriage is an economic partnership, *Kahn v. Kahn*, 801 F. Supp. 1237 (S.D.N.Y., 1992), or a civil contract between parties, *Fornshill v. Murray*, 1 Bland 479 (1828), and procreation is not a requirement.

Therefore, in regard to the ability to marry, there must be a compelling state interest to justify discriminating between a female who has had a complete hysterectomy (removal of uterus and ovaries) and is hormonally supported by hormone replacement therapy (HRT), and, a female who's vagina was surgically created and who is hormonally supported by HRT, or, for that matter, a female who has been in a serious automobile accident, and who has had pelvic reconstruction, including a neo-vagina.

The *Littleton* court failed to apply either a compelling state interest" or an "exceedingly persuasive justification" analysis for declaring Mrs. Littleton a male and voiding her Constitutionally protected Kentucky marriage under Texas law.

D. Birth Record Amendments, Corrections, & Prohibitions.

The Texas legislature has not passed any statute on the issue of a transsexual amending a birth record. However, "a number of other states have determined that transsexuals who have undergone corrective genital reassignment surgery are entitled to amend their official documents to indicate their self-identified sex."[8] *See, e.g.*, Ala. Code §22-9A-19 (1997); Ariz. Rev. Stat. Ann. § 36-326(a)(4) (West) 1993); Cal. Health & Safety Code §§103,430, 103,425 (West 1997); Colo. Rev. Stat. Ann. § 25-2-115(4) (1990); D.C. Code Ann. § 6-217 (d) (1995); Ga. Code Ann. § 31-10-23(e) (Harrison 1998); 10 Guam Gov't. Code § 3222 (1998); Haw. Rev. Stat. § 338-7.7 (1993); 410 Ill Comp. Stat. Ann. § 535-17 (West 1997); Iowa Code Ann. § 144.23.3 (1997); La. Rev. Stat. Ann §40:62 (West 1992); Md. Health-Gen. I Code Ann., § 4-214 (Lexis 1995); Mass. Gen. Laws Ann. Ch. 46 § 13 (West 1993); Mich. Comp. Laws § 333.2891 (1998); Miss. Code Ann. 41-57-21 (1998); Mo. Ann. Stat. § 193.215(9) (West Supp. 1999); N.M. Stat. Ann. § 24-14-25 (D) (Michie 1997); N.C. Gen. Stat. § 130A-118(b)(4) (1997); Or Rev. Stat. § 432.235 (4) (1997); Utah Code Ann. § 26-2-11 (Supp. 1998); Wis. Sat. Ann. § 69.15 (West 1990).

Tennessee specifically prohibits changes to birth records based upon corrective genital reassignment surgery. Tenn. Code Ann. § 68-3-203(d) (1996).

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[8] Greenberg, Julie A., *When Is A Man A Man, And When Is A Woman A Woman?*, ___ Fla. L. Rev. ___ (Sept. 2000).

Whether or not Mrs. Littleton's birth certificate indicated "male" or "female" at the time of her marriage is not relevant, or, stated in its best light, placing form over substance. The fact remains that at the time she married Jonathan Mark Littleton, Mrs. Littleton was female, both physically and mentally, and legally. Since neither Texas nor Kentucky require presentation of a birth certificate as a prerequisite for obtaining a marriage license, and require only a state issued identification,[9] the marriage was legal and entitled to be given Full Faith and Credit by the Texas courts, and Mrs. Littleton was entitled to the protections afforded by the equal protection clause of Amendment XIV.

E. Impact of this Case, Nationally.

As mentioned in the statement of the case, an equally important question is whether the constitutionally protected right to marry extends to transsexuals, and if so, whether, as, either the *male to female* bride versus groom, or, the *female to male* groom versus bride.

Christie Lee Littleton was a bride for six and one-half years, and was a widow for another three years until the Texas Court of Appeals converted her heterosexual marriage

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[9] Tex. Fam. Code Ann. § 2.005 (b) (West 1999), states: **"The proof must be established by a** certified copy of the applicant's birth certificate or by some certificate, license, or **document issued by this state,** the United States, or a foreign government." [Emphasis added.] Ky. Rev. Stat. Ann. § 400.100 (5)(b) (West 1999), states: "Vital information for each party, including full name, date of birth, place of birth, race, condition (single, widowed, or divorced), number of previous marriages, occupation, current residence, relationship to other party, full names of parents." [No statutorily required identification.]

into a "same-sex" marriage, then voided it, and, made her only eligible for marriage as a *male to female* groom.

Contrast this case to the Veteran's Affairs Opinion, *supra*, the *female to male* groom in that federal ruling was sensibly allowed to remain a groom, and, the Texas marriage to his female bride was allowed to stand.

The resolution of this issue has a direct effect on the tens-of-thousands of persons who are transsexuals, the millions of people who are intersexed,[10] and the millions of people who transsexuals and the intersexed have married or seek to marry. While the exact incidence of transsexuality and intersexuality are unknown, some estimates indicate that between 3,000 and 10,000 transsexuals have undergone hormonal and corrective genital reassignment surgery and live in the United States. Another 30,000 to 60,000 people consider themselves candidates. *See* David W. Meyers, *The Human Body and the Law*, 221 (2d ed. 1990). Although the exact incidence of intersexuality is uncertain, the intersexed constitute between one-tenth of one percent and four percent of the population. *See*: Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are not Enough,* SCIENCES, Mar.-Apr. 1993, at 20-21; Alice D.

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[10] The intersexed are those humans who have chromosome patterns other than XX or XY. For example, XYY, XYYY, XO, XXY, XXXY and any other of the numerous combinations currently identified. Most intersexed individuals initially do not know that they are intersexed, especially those who are older adults, for whom testing was not available, or, those who are younger adults, who have had no outward physical manifestations, medical, or reproductive fertility problems, and, those who are children, who are under the care and control of their parents. *See,* Greenberg, J., *Defining Male and Female: Intersexuality and Collision Between Law and biology,* 41 Ariz. L. Rev. 265 (1999).

Dreger, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX at 43 (1988).

A number of cases addressing the rights of transsexuals are in various stages of litigation. For instance, in Kansas, a male-to-female post-operative transsexual's right to inherit from her husband's estate is on appeal. In California a post-operative male-to-female transsexual married a female in England. Her employer, the Los Angeles fire department, contested the validity of her marriage (the case recently settled). In New Hampshire, the U.S. Postal service is refusing to acknowledge a male-to-female transsexual's right to be treated as a female. Finally, in Vermont, a male-to-female transsexual forced the state to issue a license to marry a woman because the state had refused to amend her birth certificate to read "female" (resulting in a legal, but socially appearing same sex marriage).

Contrary to Justice Hardberger's statement in *Littleton*, that, "Christie is medically termed a transsexual, ***a term not often heard on the streets of Texas***, nor in its courtrooms," [Emphasis added.] *Id.*, at 225 (App. C 5), in the past four decades since Renee Richards sued to establish her rights to play tennis professionally (*Richards v. U.S. Tennis Ass'n*, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (1977)) the media have repeatedly put transgendered topics before the public.[11]

---

[11] Public issues involving transsexuals and the intersexed is evident from the following sampling: *The Washington Post* (Jun 2000); *The Washington City Paper* (Sep 1999); *Esquire Magazine* (Apr 1995); news shows such as Good Morning America, A&E Investigative Reports; television talk shows like Donahue and Oprah; sitcoms like

(Continued on following page)

The *Richards* court, in analyzing the criteria to determine ones sex, stated, "However, it [referring to chromosomes] is not and should not be the sole criterion, where as here, the circumstances [clear anatomical and psychological evidence of femaleness] warrant consideration of other factors." *Ibid.*, at 721.

F. Defense of Marriage Act (DOMA) Issue

Applying DOMA, 28 U.S.C.A. §1738C (1996), to the *Littleton* case is tantamount to applying an *ex post facto* law in a criminal case. In *Littleton*, both the marriage and Jonathan Mark Littleton's death occurred before DOMA was enacted. In the *Littleton* decision, *supra*, at 226 (App. C 5), Justice Hardberger justified voiding a marriage under the public policy law enacted to protect states from having to give Full Faith and Credit to "same-sex" marriages entered into in sister states. By applying DOMA to a heterosexual marriage he first had to find Mrs. Littleton to be male to convert it into a prohibited marriage.

However, the courts and legislatures making the determination that "same-sex" marriages are illegal were considering gay and lesbian marriages. They were not considering marriages involving post-operative transsexuals. Adding transsexuals into the marital equation makes

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Night Court. The Drew Carey Show, Becker, and Will & Grace, and drama, including Picket Fences, Chicago Hope, and Judging Amy; in addition motion pictures dealing with transgender issues include "Some Like It Hot," "Victor/Victoria," "La Cage aux Fax" and "Birdcage," "Rocky Horror Picture Show," "Tootsie," "To Wong Foo, Thanks for Everything, Julie Newmar" and recently, "Boys Don't Cry" and "The Brandon Teena Story."

identifying "same-sex" marriages more theoretically problematic, but not insurmountable. The present public policy of promoting only heterosexual marriages becomes upset when the society views a transsexual's heterosexual appearing marriage under a microscope (looking at issues other than the presentation of the couple).

> ***"Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes."*** *Littleton*, at 223 (App. C 1).

CONCLUSION

Maintaining an orderly society is a lawful objective of government. Important issues of Full Faith and Credit of lawful marriages, equal protection for transsexuals, and the conflicting decisions among several states and federal authorities as to the status of transsexuals regarding marriage have reached this Court for decision and guidance.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July 17, 2000

Mr. William K. Suter
Clerk, Supreme Court of the United States
One 1st St. NE
Washington, D.C. 20543

Re: Supreme Court Case No. 00-25
Littleton, Christie L. v. Prange, Mark A.

Dear Mr. Suter:

Enclosed please find the Waiver of Response to Petitioner's Petition for Writ of Certiorari which we ask that you file with the papers in the above referenced cause. A copy is being forwarded to counsel of record herein.

Thank you for your attention to this matter.

Sincerely yours,

/s/ Thomas F. Nye
Thomas F. Nye

TNF/sam
Enclosures
99014

cc: Ms. Alyson Meiselman
14400 Lake Winds Way
North Potomac, Maryland 20878-4309

WAIVER

SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. 00-25

Littleton, Christie L. v. Prange, Mark A.
(Petitioner) (Respondent)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

☒ Please enter my appearance as Counsel of Record for all respondents.

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

_____

_____

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed since your admission):

Signature /s/ Thomas F. Nye

Date: July 17, 2000

(Type or print) Name Thomas F. Nye
☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

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A COPY OF THIS FORM MUST BE SENT TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

SEE REVERSE FOR INFORMATION CONCERNING THE STATUS OF A CASE ON THE DOCKET.

Supreme Court of the United States

No. 00-25

Christie Lee Littleton,
Petitioner

v.

Mark A. Prange

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of Texas, Fourth District, No. 04-99-00010-CV.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Court of Appeals of Texas, Fourth District.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

October 2, 2000

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy

(3)

Supreme Court, U.S.
FILED
AUG - 6 2002
OFFICE OF THE CLERK

No. 01-1853

In The
Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF
MARSHALL G. GARDINER, DECEASED

J'NOEL GARDINER, PH.D.,

Petitioner,

v.

JOSEPH M. GARDINER, III,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Kansas

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's Brief in Opposition ("Opp.") either concedes, or fails to dispute, the principal arguments made in Dr. Gardiner's Petition for Certiorari ("Pet."). And the arguments Respondent *does* raise are unpersuasive. Certiorari should be granted.

1. As the Petition explains, this Court has never addressed whether, or to what extent, non-adjudicatory State administrative determinations are "Records" entitled to full faith and credit. Pet. 15-16. Respondent essentially concedes this – in his words, "[t]he precedent which has previously been laid down from this court differentiates the credit owed to laws (legislative measures and common law) and to judgments when it comes to the application of the full faith and credit clause of the United States Constitution." Opp. 9. But this is precisely Dr. Gardiner's point – the status of non-judicial Executive-branch actions is an open question in this Court, is squarely presented by the Petition, and warrants review.[1]

Respondent does not challenge the other central arguments made in the Petition. Thus, Respondent does not deny that the lower courts are divided on the question whether non-judicial records are entitled to full faith and credit outside the issuing State and, if so, in what degree. Pet. 17-19 & nn.5-8. In particular, the lower courts disagree whether the forum's public policy can justify

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[1] Since this Court has never addressed this issue, a ruling in Dr. Gardiner's favor would not require the Court to "remove and vacate" or "abandon[ ]" its prior full faith and credit jurisprudence, as Respondent claims. Opp. 10-11, 20.

disregarding the actions of another State's Executive – a significant disagreement, given that a State's "public policy" is often discernible only in the eye of the beholder.

In her Petition, Dr. Gardiner also argued that the Question Presented is important, for a number of reasons: the ubiquity of administrative-agency actions as a source of legal rights and obligations; the need for certainty with respect to vital records in particular; and the confused legal status of transsexuals, which fully 21 States have sought to clarify by enacting laws, like Wisconsin's, which permit the amendment of the sex designation in birth records. Pet. 17, 21-25. Respondent does not respond, even though these arguments were the centerpiece of the Petition.

2. Rather than responding to the Petition, Respondent raises a series of virtually frivolous objections. First, Respondent argues that the denial of certiorari in *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Civ. App. 1999), *cert. denied*, 531 U.S. 872 (2000), somehow bars the present Petition, since Dr. Gardiner supposedly has failed to justify "this Court [ ] reconsider[ing] its previous decision not to grant a Writ of Certiorari" in *Littleton*. Opp. 5.

Respondent's argument is doubly flawed. First, "[o]f course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995), quoting *United States v. Carver*, 260 U.S. 482, 490 (1923). Indeed, this Court has held that the denial of certiorari is not preclusive *even as between the parties themselves*. *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973) (denial of certiorari to review interlocutory ruling does not preclude grant of

certiorari after final judgment). The denial of certiorari in *Littleton* is irrelevant here; Dr. Gardiner need not justify the "reconsider[ation]" of that action.

Equally devastating to Respondent's argument, however, is that *this case presents a different issue from Littleton*. While *Littleton* also involved the validity of a transsexual's marriage, in *Littleton* the transsexual was born in Texas, the same State later asked to determine the validity of her marriage. *Littleton* held that the transsexual's attempt to change the sex designation in her original Texas birth certificate was ineffective under Texas law, which (unlike Wis. Stat. § 69.15(4)(b)) only permits such an amendment where the original record "is incomplete or proved by satisfactory evidence to be inaccurate." Tex. Health & Safety Code Ann. § 191.028, discussed at 9 S.W.3d at 231. Thus, to the extent *Littleton* refused to give effect to an amended birth certificate, it did so as a matter of *State* – not constitutional – law. *Littleton* thus did not raise "the very issues raised in [Dr. Gardiner's] Petition," as Respondent contends. Opp. 5. Moreover, even a brief comparison shows that Respondent's claim that Dr. Gardiner raises "no new issues or arguments" than those presented in *Littleton* is blatantly false. *Compare* Pet. 14-26 *with* Respondent's App. 13-15.

3. The Brief in Opposition also relies on Wis. Stat. § 69.21(1)(c), which permits the courts to determine the "evidentiary value" of "a vital record which has been amended." According to Respondent, this provision "opened the door to the reviewing state to make an independent decision as to whether or not the new birth certificate would violate the public policy of the reviewing state." Opp. 7.

But Wis. Stat. § 69.21(1)(c) cannot justify the lower court's ruling. Notably (and unlike the Court of Appeals, *see* Pet. App. 90a-91a), the Kansas Supreme Court did not invoke § 69.21(1)(c) to justify its decision. Rather, as Respondent acknowledges (Opp. ii, 7), the Kansas Supreme Court relied on its view of Kansas public policy, not the "evidentiary value" of the Wisconsin record. Respondent cannot justify the denial of certiorari on a rationale the Kansas Supreme Court never adopted.

In any event, § 69.21(1)(c) does not give reviewing courts free reign to reject amended vital records willy-nilly. The statutory reference to a determination of "evidentiary value" does not authorize consideration of the forum's public policy. Under Respondent's reading of § 69.21(1)(c), that provision would completely nullify Wis. Stat. § 69.15(4)(b), and render it meaningless, since it would allow a court, in every instance where a transsexual's sex was in question, to choose to disregard an amended birth certificate for no reason other than simple disagreement with its contents. Section 69.21(1)(c) cannot be twisted to justify the Kansas Supreme Court's decision.

Properly construed, § 69.21(1)(c) only permits a reviewing court to inquire into the *factual accuracy* of a vital record (for example, whether Dr. Gardiner had in fact undergone "a surgical sex change procedure" justifying amendment to her birth certificate under Wis. Stat. § 69.15(4)(b)). *See* Pet. 28-29. This is all the court did in the Wisconsin case Respondent cites. *See Lubnor v. Peerless Ins. Co.*, 19 Wis.2d 364, 372, 120 N.W.2d 54, 58 (1963) (cause of death reported by non-physician in death certificate "rebutted * * * [by] the competent medical evidence in the case"). Federal trial courts have applied similar State statutes in the same way, asking only whether other

evidence proves the factual inaccuracy of an amended vital record. *See* Pet. 28-29 n.19 (citing cases). Yet the Kansas Supreme Court engaged in no such inquiry: it did not dispute the correctness of Dr. Gardiner's amended birth certificate under Wisconsin law, but instead expressed its policy disagreement with Wisconsin law itself. The Kansas Supreme Court did not act under Wis. Stat. § 69.21(1)(c).

4. Respondent next argues that Dr. Gardiner's amended birth certificate was "merely a ministerial act" which "changed the wording of [Dr. Gardiner's] birth certificate." Opp. 11-12. But Respondent ignores that, by permitting the amendment of birth records, Wisconsin and the 20 other States with similar laws clearly intended those amended records to have legal significance – namely, to change the legally recognized sex designation of the relevant individual. The lower court's decision denies Wisconsin's action this effect.

5. Respondent's reliance on the fact that neither Respondent, nor the State of Kansas, were parties to the Wisconsin proceeding (Opp. 3, 15-16) is likewise irrelevant. While it is premature to get into a full debate on the merits, this Court has never held that the full faith and credit command applies only to persons who were parties, or in privity with parties, to an earlier proceeding. To the contrary, this Court has expressly held that a "status" determination like Dr. Gardiner's amended sex designation must be recognized in other States, *even as against non-parties*, since such status determinations are meaningless unless universally recognized. *Williams v. North Carolina*, 317 U.S. 287, 297-98 (1942) (*ex parte* Nevada divorce preclusive against State of North Carolina in later bigamy prosecution).

6. Respondent also apparently argues that Dr. Gardiner's full faith and credit argument is foreclosed because Congress intentionally did not address it when enacting the Defense of Marriage Act, 28 U.S.C. § 1738C. Opp. 17-19. Respondent cites no authority for his claim (Opp. 18) that Congress was "reluctant" to address that issue. But even if it were true, Respondent's argument is puzzling – the Defense of Marriage Act deals with the recognition due foreign-state marriages, *not* birth records, and creates an *exception* to the States' full faith and credit obligations. Respondent does not explain why Congress' failure to foreclose Dr. Gardiner's constitutional claim somehow prejudices her rights.

Respondent then makes the following startling claim:

> [I]t is the Congress of the United States which is tasked under Article 4, Clause 1 with the authority to prescribe the manner in which acts, records and proceedings shall be given full faith and credit among the various states. The novel approach of the Petition is that * * * this Court should * * * render[ ] a decision legislative in nature, that the legislative branch of the government, the Congress assembled, has specifically declined to do. This is not the traditional role of the United States Supreme Court.

Opp. 19.

It is difficult to know what Respondent means to argue in this passage. But to the extent he is arguing that the courts may only apply the Full Faith and Credit Clause in circumstances where Congress has passed implementing legislation, that argument suffers from (at least) two fatal flaws. First, in 1804 Congress enacted a statute explicitly requiring each State to give full faith and

credit to the non-judicial records of other States. *See* Pet. 14-15 (quoting Act of March 27, 1804, ch. 56, 2 Stat. 298, 298-99 (present version at 28 U.S.C. § 1739)). If an implementing statute is necessary, one exists here.

Second, "it is quite clear that Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by the implementing legislation." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272-73 n.18 (1980) (plurality opinion); *see also, e.g.*, *Hughes v. Fetter*, 341 U.S. 609, 613-14 n.16 (1951) (requiring Wisconsin to allow suit under Illinois wrongful death statute, even though 28 U.S.C. § 1738 at that time did not require full faith and credit for State statutes); *Bradford Elec. Co. v. Clapper*, 286 U.S. 145, 154-55 (1932) (same). Thus, whether Congress has enacted a statute requiring recognition of Dr. Gardiner's amended birth certificate is irrelevant; this Court can apply the Full Faith and Credit Clause with or without implementing legislation.[2]

7. Respondent's Brief in Opposition makes an assortment of additional arguments, none of which merit extended discussion.

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[2] Respondent's argument that the Defense of Marriage Act would have authorized a Kansas court to disregard Dr. Gardiner's marriage, if she had been married in another State, Opp. 17-18, likewise misses the mark. The Defense of Marriage Act provides that a State need not recognize a marriage "between persons of the same sex," without establishing any criteria by which a person's sex shall be determined. 28 U.S.C. § 1738C. If Dr. Gardiner's full faith and credit argument is accepted, the Defense of Marriage Act is irrelevant, since she and her deceased husband were *not* "of the same sex."

Mysteriously, Respondent seeks to attach significance to the fact that "Wisconsin courts have never passed on the validity" of Wis. Stat. § 69.15(4)(b). Opp. 4. Yet Respondent does not now suggest, and did not suggest below, any conceivable basis for holding that statute invalid. It is downright silly for Respondent to suggest that this Court should regard § 69.15(4)(b) as of dubious constitutionality when no one – least of all Respondent – has sought to challenge it.

Respondent also suggests that certain failed measures offered in the Wisconsin legislature, seeking to "define[ ] marriage as being between one man and one woman," somehow show that "the entire issue [of a transsexual's sex designation] is unresolved in Wisconsin." Opp. 4 & n.5. But Respondent does not claim that these measures defined a "woman" so as to exclude a transsexual who has obtained an amended birth certificate under Wis. Stat. § 69.15(4)(b). From all that appears, these unenacted bills are fully consistent with Dr. Gardiner's position. In any event, these failed proposals shed no light on the straightforward meaning of Wis. Stat. § 69.15(4)(b) – to change a post-operative transsexual's sex designation in the eyes of the law. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute'"; citation omitted).

Respondent also describes at length the facts purportedly showing the existence of a premarital agreement between Dr. Gardiner and her deceased husband, by which Respondent claims Dr. Gardiner waived her right to a share of Marshall Gardiner's estate. Opp. 1-2. But the Kansas District Court rejected Respondent's motion for

summary judgment on this issue, Pet. App. 100a-102a, and both the Kansas Court of Appeals and the Supreme Court refused to even consider it, because Respondent failed to cross-appeal. Pet. App. 7a, 92a. Respondent's discussion of these extraneous facts is simply an attempt to distract this Court from the issue actually before it.[3]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[3] Lest the Court be misled, Dr. Gardiner notes that the arguments Respondent ascribes to her in his Brief in Opposition (at 16-17, 20), do not represent statements made by Dr. Gardiner or her counsel, although they are indented in a style normally reserved for direct quotations.